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JUDGE

AMY RONAYNE KRAUSE

Judge Amy Ronayne Krause has been on the Court of Appeals since December 2010. Previously, she served as a judge on the 54-A District Court in Lansing for nearly eight years. Judge Ronayne Krause received her Bachelor of Arts from the University of Michigan and her Juris Doctor from the University of Notre Dame.

Judge Ronayne Krause began her legal career as a litigation attorney for a private law firm and then served eight years as an assistant prosecuting attorney. In 1997, she was appointed an assistant attorney general by then Attorney General Frank J. Kelley and was the first recipient of the Frank J. Kelley Award for Excellence in Trial Advocacy. Judge Ronayne Krause worked for the Attorney General's office for six years. Before taking the bench, Judge Ronayne Krause was elected to serve on the Ingham County Board of Commissioners, during which time she chaired the Law and Courts Committee. She is an adjunct professor at Thomas M. Cooley Law School and has lectured for the Prosecuting Attorneys Association of Michigan. She has also taught for the Michigan Judicial Institute, including teaching other district judges at the New Judges Seminar in 2007 and 2009. Judge Ronayne Krause also serves as faculty for the National Council of Juvenile and Family Court Judges, training other judges on a national level.

In September 2007, Judge Ronayne Krause was recognized statewide for her outstanding work with the State Bar of Michigan's Champion of Justice Award. She currently serves her community as a board member of the Lansing Educational Advancement Foundation (LEAF), the Uplift Our Youth Foundation, and the American Red Cross Board of Directors for the Great Lakes Region. Judge Ronayne Krause was appointed in 2011 by the Speaker of the House and the Senate Majority Leader to the State Drug Treatment Court Advisory Committee.

Judge Ronayne Krause and her husband, Kurt E. Krause, live in Lansing.

COURT OF APPEALS CASES

PEOPLE v BULGER

Docket No. 288312. Submitted November 9, 2010, at Detroit. Decided November 30, 2010, at 9:00 a.m.

Michael Bulger pleaded no contest in the Macomb Circuit Court to one count of operating a motor vehicle while intoxicated and causing death, MCL 257.625(4)(a), and one count of operating a motor vehicle while intoxicated, second offense, MCL 257.625(1) and (9)(b). The court, Mary A. Chrzanowski, J., sentenced defendant to 71 months to 15 years in prison for the conviction of operating a motor vehicle while intoxicated and causing death and 93 days for the conviction of operating a motor vehicle while intoxicated, second offense. Defendant appealed by leave granted the denial of his motion for resentencing, claiming that the court erred by scoring two points for prior record variable (PRV) 5, MCL 777.55, on the basis of defendant's prior conviction of operating a vehicle while a minor with any bodily alcohol content (the "zero-tolerance" provision), MCL 257.625(6), and noting that the prior conviction did not require proof that he had been under the influence of alcohol or was impaired by alcohol as was allegedly required for scoring PRV 5.

The Court of Appeals *held*:

1. A "prior conviction" is defined, for purposes of MCL 257.625, as any violation of the subsections of MCL 257.625, except subsection 2. The Legislature specifically chose to count prior convictions of violating MCL 257.625(6) as prior convictions for the purposes of MCL 257.625.

2. The Legislature used the phrase "under the influence of or impaired by" in MCL 777.55(2)(b) to refer to the drunk-driving statute, MCL 257.625, as a whole and not to specific crimes that include the same language as an element. MCL 257.625 provides clear evidence that the Legislature intended to use prior convictions under MCL 257.625(6) to increase the sentences of repeat offenders. The trial court correctly calculated PRV 5.

Affirmed.

1. SENTENCES — DRUNK DRIVING — SENTENCE ENHANCEMENTS — REPEAT OFFENDERS.

A prior conviction of operating a motor vehicle while a minor and with any bodily alcohol content, MCL 257.625(6), may be used to increase the sentences of a defendant who is a repeat offender under the drunk-driving statute, MCL 257.625.

2. SENTENCES — PRIOR RECORD VARIABLE 5 — SENTENCE ENHANCEMENTS — WORDS AND PHRASES — UNDER THE INFLUENCE OF OR IMPAIRED BY ALCOHOL.

The phrase "under the influence of or impaired by" alcohol in the statute regarding the scoring of prior record variable 5 refers to the drunk-driving statute, MCL 257.625, as a whole and not to specific crimes that include the same language as an element; a prior conviction under MCL 257.625(6) of operating a motor vehicle while a minor and with any bodily alcohol content may be used in scoring prior record variable 5 (MCL 777.55).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Lawyer, and *Joshua D. Abbott*, Assistant Prosecuting Attorney, for the people.

Peralta, Johnston & Karam (by *Dennis A. Johnston*) for defendant.

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM. Defendant, Michael Bulger, pleaded no contest to one count of operating a motor vehicle while intoxicated causing death[1] and one count of operating a motor vehicle while intoxicated, second offense.[2] The trial court sentenced Bulger to 71 months to 15 years in prison for the conviction of operating a motor vehicle while intoxicated causing death and 93 days for the conviction of operating a motor vehicle while intoxicated, second offense, with credit for three days already served. Bulger now appeals by leave granted. We affirm.

---

[1] MCL 257.625(4)(a).

[2] MCL 257.625(1) and (9)(b).

I. BASIC FACTS

On April 19, 2007, Bulger drove a vehicle on North Avenue in Macomb Township while under the influence of alcohol, causing the death of Emilee Floer. On October 30, 2007, Bulger pleaded no contest to the charges of operating a motor vehicle while intoxicated causing death and operating while intoxicated, second offense.

The trial court determined, based on Bulger's prior record and offense variable scores, that for the conviction of operating while intoxicated causing death, the sentencing guidelines called for a minimum sentence of 36 to 71 months. In scoring the sentencing guidelines, the trial court assessed two points under prior record variable (PRV) 5[3] for Bulger's prior conviction of operating a vehicle as a minor with any bodily alcohol content (the "zero-tolerance provision").[4] The trial court sentenced Bulger to concurrent terms of 71 months to 15 years in prison for the conviction of

[3] MCL 777.55.

[4] MCL 257.625(6) provides:

> A person who is less than 21 years of age, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has any bodily alcohol content. As used in this subsection, "any bodily alcohol content" means either of the following:
>
> (a) An alcohol content of 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of 0.02 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
>
> (b) Any presence of alcohol within a person's body resulting from the consumption of alcoholic liquor, other than consumption of alcoholic liquor as a part of a generally recognized religious service or ceremony.

operating while intoxicated causing death and 93 days for the conviction of operating while intoxicated, second offense, with a credit of three days for time served. Bulger moved for resentencing, challenging the trial court's scoring of PRV 5. Bulger claimed that PRV 5 should have been scored at zero points, resulting in a reduced minimum recommendation of 29 to 57 months. The trial court denied Bulger's motion. Bulger now appeals.

II. SENTENCING

A. STANDARD OF REVIEW

Bulger argues that the trial court erred by denying his motion for resentencing. This Court reviews de novo the proper interpretation and application of Michigan's legislative sentencing guidelines.[5]

B. PRIOR CONVICTION

Bulger argues that his prior conviction of underage drinking and driving under the zero-tolerance provision does not constitute the type of prior conviction that may be counted against him in scoring under the sentencing guidelines. More specifically, he argues that the prior offense was not an offense for "operating a vehicle . . . while under the influence of or impaired by alcohol" because it merely required proof that there was alcohol in Bulger's body, not that he was "under the influence" or "impaired."

This is an issue of first impression. We conclude that the best reading of Michigan's legislative sentencing guidelines, in conjunction with MCL 257.625, supports the prosecution's argument that the trial court properly

[5] *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

counted Bulger's prior conviction under the zero-tolerance provision when determining his sentence range.

The sentencing-guidelines statute regarding scoring PRV 5 calls for the trial court to

> [c]ount all prior misdemeanor convictions and prior misdemeanor juvenile adjudications for operating or attempting to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while under the influence of or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance. Do not count a prior conviction used to enhance the sentencing offense to a felony.[6]

Therefore, the crucial question is whether Bulger's conviction of being a minor who operated a vehicle while having any bodily alcohol content constituted a misdemeanor for operating a vehicle while "under the influence" of alcohol or "impaired by" alcohol.

Resolution of the issue requires this Court to interpret MCL 777.55. And, in doing so, we should ascertain and give effect to the Legislature's intent.[7] We should also reasonably construe the statute, keeping in mind the purpose of the act.[8] Further, we must enforce clear statutory language as written.[9] However, we bear in mind that seemingly plain language may be rendered ambiguous when used in connection with another statute.[10] Thus, we should reconcile apparent inconsistencies if possible.[11]

It is true that Bulger's prior conviction under the

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[6] MCL 777.55(2)(b).

[7] *People v Giovannini*, 271 Mich App 409, 411; 722 NW2d 237 (2006).

[8] *Id.*

[9] *People v Gillis*, 474 Mich 105, 115; 712 NW2d 419 (2006).

[10] *People v Valentin*, 457 Mich 1, 6; 577 NW2d 73 (1998).

[11] *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002); *People v Coffee*, 151 Mich App 364, 369; 390 NW2d 721 (1986).

zero-tolerance provision did not require proof that he was actually under the influence of alcohol or was impaired by alcohol.[12] Further, the Legislature differentiated the zero-tolerance provision from the crimes of operating while intoxicated or operating while visibly impaired by prohibiting a plea of guilty or nolo contendere to a zero-tolerance charge in exchange for dropping either of the more serious charges.[13] Finally, the zero-tolerance provision applies when a minor has an alcohol content of less than 0.08 grams per 100 milliliters of blood, whereas operating while intoxicated requires an alcohol content of at least 0.08 grams.[14]

However, when considering whether a prior violation of the zero-tolerance provision should be treated as a prior offense, the Legislature chose not to make such broad distinctions. MCL 257.625(9) requires heavier fines and increased jail time for offenders with one or more prior convictions, and multiple prior convictions raise operating while intoxicated to a felony. For the purposes of MCL 257.625, a "prior conviction" is defined as any violation of the subsections of MCL 257.625, except subsection (2), the crime of a car owner's authorizing a person who is under the influence of alcohol to drive the owner's vehicle.[15] Thus, the Legislature specifically chose to count prior violations of the zero-tolerance provision as prior convictions for the purposes of MCL 257.625. The only limitation is that multiple violations of the zero-tolerance provision count as a single prior conviction.[16]

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[12] MCL 257.625(6).

[13] MCL 257.625(16).

[14] MCL 257.625(1)(b) and (6)(a).

[15] MCL 257.625(25) (excluding MCL 257.625[2]).

[16] MCL 257.625(26).

We can extend the approach in the drunk-driving statute, MCL 257.625, to the sentencing statute, MCL 777.55, if we read the sentencing statute broadly to refer to the drunk-driving statute as a whole, rather than to the specific crimes that require proof of operating a vehicle "under the influence of or impaired by" alcohol. Because the drunk-driving statute itself uses the words in both the broad and narrow senses, applying the broad sense to the sentencing statute does not create any new linguistic conflicts. In addition, Bulger's argument would lead to the incongruous situation where a conviction under the zero-tolerance provision would count as a prior conviction for purposes of raising a misdemeanor to a felony, but not for purposes of a sentencing enhancement. It is more likely, therefore, that the Legislature's use of "under the influence of or impaired by" in the sentencing statute refers to the drunk-driving statute as a whole and not to specific crimes that include the same language as an element. The drunk-driving statute provides clear evidence that the Legislature intended to use prior convictions under the zero-tolerance provision to increase the sentences of repeat offenders. Reading the language in the sentencing statute broadly produces a result in which the sentencing statute and the drunk-driving statute coexist harmoniously.

Bulger also claims that several of his prior record and offense variable scores are unconstitutional under *Blakely v Washington*.[17] However, the Michigan Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing system.[18] Therefore, his argument on this point is without merit.

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[17] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[18] *People v Drohan*, 475 Mich 140, 159; 715 NW2d 778 (2006).

The best reading of the sentencing statute[19] and the zero-tolerance provision[20] together reveals that the trial court properly considered Bulger's violation of the zero-tolerance provision in scoring two points for PRV 5. Accordingly, we conclude that the trial court correctly calculated PRV 5.

We affirm.

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[19] MCL 777.55(2)(b).

[20] MCL 257.625(6).

In re KLOCEK

Docket No. 292993. Submitted November 4, 2010, at Lansing. Decided November 30, 2010, at 9:05 a.m.

After Brittaney R. Klocek, a juvenile, admitted by plea to a petition charging one count of malicious use of a telecommunications device, that was later dismissed with a warning given to her, Klocek moved the Washtenaw Circuit Court to order the destruction of her fingerprints and arrest card. She asserted that her case was dismissed without trial and therefore the official holding her fingerprints and arrest card was required by law to destroy them. The court, Donald E. Shelton, J., held that because the case had been dismissed, Klocek was entitled to destruction of the documents. The prosecution appealed.

The Court of Appeals *held*:

Under MCL 28.243(8), fingerprints and arrest cards shall be destroyed if (1) the case involves a juvenile who was adjudicated and found not to be within the provisions of MCL 712A.2(a)(1) (i.e., those found not to be within the jurisdiction of the family division of circuit court), or (2) the accused is found not guilty. The dismissal of respondent's case did not constitute a finding of not guilty, and there was no dispute that respondent was a juvenile found to be within the jurisdiction of the family division of the court. Respondent was not entitled to the destruction of her fingerprints and arrest card.

Reversed.

JUVENILE LAW — DISCHARGE AND DISMISSAL OF JUVENILE PROCEEDINGS — FINGERPRINT RECORDS — ARREST RECORDS.

Fingerprints and arrest cards shall be destroyed if (1) the case involves a juvenile who was adjudicated and found not to be within the provisions of MCL 712A.2(a)(1) (i.e., those found not to be within the jurisdiction of the family division of circuit court), or (2) the accused is found not guilty; the dismissal of a case does not constitute a finding of not guilty (MCL 28.243[8]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney,

and *David A. King*, Assistant Prosecuting Attorney, for the people.

Simon & Geherin, PLLC (by *Joseph A. Simon*, *Daniel T. Geherin*, and *Carl D. Macpherson*), for respondent.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

SAAD, J. On June 26, 2009, the trial court issued an order that directed the Michigan State Police to immediately destroy the fingerprints and arrest card of respondent.[1] Petitioner appeals by leave granted and, for the reasons set forth below, we reverse.

I. FACTS AND PROCEEDINGS

On July 13, 2007, a petition was filed charging respondent, a juvenile, with one count of malicious use of a telecommunications device. MCL 750.540e. On August 15, 2007, the court held an adjudication hearing. The lower court docket sheet indicates that respondent "admitted allegation," and the court entered an "order of adjudication." A dispositional hearing was set for December 18, 2007, but the docket sheet indicates that on December 17, the petition was dismissed. Another entry for that date says "warned and dismissed," which apparently refers to MCL 712A.18(1)(a), which permits a court to "[w]arn the juvenile" and "dismiss the petition" in disposing of the case. The order of adjudication, which is on a standard SCAO form, indicates that respondent was "adjudicated by plea" of "AAL." The form does not explain what "AAL" means,

[1] A substitute order was entered on July 8, 2009; respondent represented that it was submitted because the State Court Administrative Office (SCAO) had issued a new form for the order.

though it does say that "A" indicates "admission." On the first page of the order there is a checked box for "A fingerprintable juvenile offense was committed under MCL 28.243 or MCL 28.727," and another checked box for "Fingerprints have been taken." On the second page of the form is a checked box for "Plea taken under Cobbs agreement."[2]

On May 1, 2009, respondent moved for destruction of her fingerprints and arrest card. She filed the motion using SCAO Form MC 235, which incorporates both the motion and the order in a single form. The form contains two choices for the movant: "I was found not guilty of all offense(s) charged in this case . . ." and "my case was dismissed without trial, and the arresting agency and/or Michigan State Police has not destroyed the fingerprints and arrest card as required by law." Respondent checked the box indicating that her case was dismissed without trial. At the hearing on the motion, respondent argued that under MCL 28.243(7), (8) and (9), which govern the destruction of fingerprints and arrest cards, destruction is warranted if the petition is dismissed. Petitioner disagreed and argued that destruction is not authorized if, as here, there is an adjudication of guilt, even if it results in a "warn and dismiss." The trial court ruled that the case cited by the parties, *McElroy v State Police Info Ctr*, 274 Mich App 32; 731 NW2d 138 (2007), is not dispositive and held that, because the case was "dismissed," respondent is entitled to destruction of the documents under the statute.

II. ANALYSIS

We hold that the trial court erred when it ruled that respondent is entitled to destruction of her fingerprints

[2] *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

and arrest card.[3] The applicable statute, MCL 28.243(8), provides:

> If a juvenile is adjudicated and found not to be within the provisions of [MCL 712A.2(a)(1)], or if an accused is found not guilty of an offense for which he or she was fingerprinted under this section, upon final disposition of the charge against the accused or juvenile, the fingerprints and arrest card shall be destroyed by the official holding those items and the clerk of the court entering the disposition shall notify the department of any finding of not guilty or not guilty by reason of insanity, dismissal, or nolle prosequi, if it appears that the accused was initially fingerprinted under this section, or of any finding that a juvenile alleged responsible for a juvenile offense is not within the provisions of [MCL 712A.2(a)(1)].

Thus, the statute provides that fingerprints and arrest cards shall be destroyed if (1) the case involves a juvenile who was adjudicated and found not to be within the provisions of MCL 712A.2(a)(1), or (2) the accused is found not guilty.

Although *McElroy* involves factual circumstances slightly different than those here, this Court rejected McElroy's argument, which was essentially the same as the one made by respondent. In *McElroy*, the plaintiff had entered a plea of no contest to domestic violence charges with an agreement that the charges would be dismissed pursuant to MCL 769.4a if he successfully completed probation and a domestic violence program. *McElroy*, 274 Mich App at 33-34. Section 769.4a(5) provided that the discharge and dismissal would be "without adjudication of guilt." *Id*. at 36. The plaintiff completed the requirements for discharge and dismissal, at which point the plea was set aside and the

[3] Resolution of this case turns on the interpretation of MCL 28.243(8). Review of the trial court's determination is therefore de novo. *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

case dismissed. *Id*. at 34. The plaintiff then sought a writ of mandamus to compel the Michigan State Police Information Center ("MSPIC") to surrender his fingerprint card, arrest card, and description. *Id*. at 35. The MSPIC argued that the plaintiff was not found "not guilty," and that therefore MCL 769.4a(6) required it to keep a nonpublic record. *Id*. Retention of the nonpublic record is required because only one discharge and dismissal is allowed under MCL 769.4a(6) and the nonpublic record serves to establish that there has already been one discharge and dismissal. *Id*. Construing only the second statutory requirement in MCL 28.243(8), the *McElroy* Court held that the statute does not require destruction of the documents following a dismissal; it requires destruction only if the defendant is found not guilty. *Id*. at 37-39. As noted, MCL 769.4a(5) expressly stated that the discharge and dismissal were not an adjudication of guilt.

In this case, the trial court relied on the part of MCL 28.243(8) that provides, "the clerk of the court entering the disposition shall notify the department of any finding of not guilty or not guilty by reason of insanity, *dismissal*, or nolle prosequi." (Emphasis added.) In *McElroy*, this Court addressed that point:

> McElroy's assertion that subsection 8 provides that a dismissal is a *type* of finding of not guilty is essentially a request that this Court read into the statute an interpretation that is not supported by its plain language, and we are bound to deny such requests. See *People v Spann*, 250 Mich App 527, 532; 655 NW2d 251 (2002) (holding that "[n]othing will be read into a statute that is not within the manifest intention of the Legislature as gathered from the act itself").[4]

[4] Though subsection 8 requires the clerk to *report* a dismissal to the department, it does not logically follow that the dismissal must require defendant to destroy the

> enumerated documents. A plain reading of the statute compels the conclusion that the only duty imposed by subsection 8 following a dismissal is the duty for the clerk to notify the department of the dismissal. [*Id*., 38.]

This Court concluded that "McElroy cannot establish that he has a clear legal right to have the documents destroyed" because he "has not shown that the discharge and dismissal was a finding of not guilty under MCL 28.243(8)." *Id*. at 36, 38. Pursuant to that ruling, it was erroneous for the trial court in the present case to rely on the use of the word "dismissal."

A similar result obtained in *People v Benjamin*, 283 Mich App 526; 769 NW2d 748 (2009). In *Benjamin*, the three defendants pleaded guilty to possession of less than 25 grams of cocaine. *Id*. at 527. Because it was a first offense, the defendants were allowed to participate in a diversionary program under MCL 333.7411. *Benjamin*, 283 Mich App at 527. Subsection (1) of that statute provides that, after a plea or finding of guilt, the proceedings may be deferred "without entering a judgment of guilt" while the defendant is placed on probation. *Id*. at 530-531. If the probation is successful, the defendant is discharged and the proceedings are dismissed. *Id*.

Following discharge and dismissal in *Benjamin*, the defendants successfully moved for destruction of their fingerprint and arrest records. *Id*. at 527. This Court reversed. *Id*. It noted that MCL 333.7411(2) requires retention of a nonpublic record of the arrest and discharge or dismissal for the purpose of alerting authorities that an offender had already taken advantage of this deferral provision.[4] *Id*. at 531. Moreover, given the

[4] Though this Court found the issue moot, it went on to discuss whether the statute required that the nonpublic record include the fingerprint and arrest card. *Id*. at 537. It opined that these records would

similarity between this deferral scheme and that at issue in *McElroy*, the Court in *Benjamin* concluded that *McElroy* controlled. *Id*. at 534-535. The Court rejected the notion that *McElroy* was distinguishable because the plea entered was a no contest plea. *Id*. The Court observed that the no contest plea was not the basis for the determination that there was no finding of guilt in *McElroy*, but rather the express language of MCL 769.4a(5) controlled because it provides that the discharge and dismissal were not an adjudication of guilt. *Id*. Because the pleas of guilty in *Benjamin* were rendered a nullity by the successful diversion, the Court ruled there was no finding as to guilt and, coextensively, no finding of "not guilty." *Id*.

Here, there is no finding that respondent was "not guilty." To the contrary, respondent admitted her guilt. Respondent suggests that the subsequent dismissal nullified this admission. However, even were we to agree, the dismissal did not constitute a finding of "not guilty." Based on the statute, as interpreted by *McElroy* and *Benjamin*, respondent was not entitled to the relief she requested.[5]

McElroy and *Benjamin* address only the second criterion for destruction of fingerprint and arrest cards set forth in MCL 28.243(8), i.e., the defendant is found not guilty. By the plain language of MCL 28.243(8), there are two classes of persons who are entitled to destruction of their fingerprints and arrest card: (1) a juvenile who "is adjudicated and found not to be within the provisions of [MCL 712A.2(a)(1)]" (i.e., those found not

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have to be kept to insure the accuracy of identification for purposes of determining whether a defendant had received a previous deferral. *Id*.

[5] We recognize that certain juvenile dispositions remain public records while certain adult dispositions do not. However, we are bound by the language of the statute at issue and it is up to the Legislature to address whether public policy may warrant a change in the statute.

to be within the jurisdiction of the family division of circuit court); and (2) an accused who "is found not guilty of an offense for which he or she was fingerprinted." Here, an adjudication hearing was held at which respondent admitted the allegation against her. The court entered an "order of adjudication," which indicates that she was "adjudicated by plea." On the second page of the order is a checked box for "Plea taken under Cobbs agreement." Thus, respondent was neither a juvenile found not to be within the family court's jurisdiction nor an accused found not guilty. As was the case with *McElroy*, the mere fact that the proceedings against respondent were later dismissed does not entitle her to destruction of her fingerprints and arrest cards.

Reversed.

SHADE v WRIGHT

Docket No. 296318. Submitted September 9, 2010, at Lansing. Decided December 2, 2010, at 9:00 a.m.

Plaintiff, Carolyn M. Shade, petitioned the Midland Circuit Court to modify the order of parenting time incorporated into the parties' November 29, 2006, judgment of divorce, which had allowed her to move with the minor child to Ohio, and defendant, Stuart N. Wright, Jr., filed a motion for change of custody, seeking to modify the same judgment. The judgment of divorce had incorporated the parties' agreement at the time that the child would live with plaintiff in Ohio and defendant would have parenting time of two weekends per month, eight weeks in summer, every Christmas break, and every spring break, with plaintiff responsible for all transportation at these times. Both parties became dissatisfied with the arrangement; plaintiff argued a change of circumstances warranted a change in parenting time and defendant sought sole physical custody of the child. After a hearing de novo on both motions, the court, Jonathan E. Lauderbach, J., denied defendant's motion for change of custody and modified the parenting time so defendant had visitation one extended weekend per month, the entire summer vacation except when that conflicted with the child's sports schedule, every other spring break, and every Christmas break as originally provided. The court ordered the parties to transport the child to exercise their respective parenting times. Defendant appealed, challenging only the part of the order modifying parenting time.

The Court of Appeals *held*:

1. The trial court was not bound by the parenting-time schedule in the judgment of divorce but was authorized to change the schedule if plaintiff established, by a preponderance of the evidence, that the change was in the child's best interests. Under MCL 722.27(1)(c), a court may modify or amend its previous parenting time order for proper cause shown or because of a change of circumstances. Although normal life changes are insufficient grounds to change a minor child's custodial environment, if a change in parenting time is not so significant that it results in a change in the minor child's custodial environment, then normal

life changes may constitute a change of circumstances sufficient to modify parenting time. The fact that the child had begun high school and sought to become more involved in social and extracurricular activities—normal life changes insufficient to warrant a change of custodial environment—constituted a change of circumstances sufficient to modify parenting time.

2. A trial court may order a change in parenting time if it finds the change is in the child's best interests. Both the statutory best-interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting-time statute, MCL 722.27a(6), are relevant to parenting time decisions, but the court must make findings on only the contested factors. The court's statements on the record were sufficient to establish that it found the change was in the child's best interests because it did not significantly alter the number of defendant's parenting time days and allowed the child to participate in social and extracurricular activities, as she desired. Enabling the change in parenting time by requiring the parties to transport the child to their respective parenting time was in the child's best interests.

Affirmed.

JANSEN, J., concurred in the result only.

1. PARENT AND CHILD — PARENTING TIME — CHANGES IN PARENTING TIME — PROPER CAUSE OR CHANGE OF CIRCUMSTANCES.

A court may modify or amend its previous parenting-time order for proper cause shown or because of a change of circumstances; although normal life changes are insufficient grounds to change a minor child's custodial environment, if a change in parenting time is not so significant that it results in a change in the minor child's custodial environment, then normal life changes may constitute a change of circumstances sufficient to modify parenting time (MCL 722.27[1][c]).

2. PARENT AND CHILD — PARENTING TIME — CHANGES IN PARENTING TIME — BEST INTERESTS OF THE CHILD.

A trial court may order a change in parenting time if it finds the change is in the child's best interests; both the statutory best-interest factors in the Child Custody Act and the factors listed in the parenting-time statute are relevant to parenting-time decisions, but the court must make findings on only the contested factors (MCL 722.23, MCL 722.27a[6]).

Aleck & Jenkins (by *Ghazey H. Aleck, II*) for Stuart N. Wright, Jr.

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM. Defendant, Stuart N. Wright, Jr., appeals as of right an order granting the motion by plaintiff, Carolyn Shade, to modify parenting time with the parties' minor child.[1] For the reasons set forth in this opinion, we affirm.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

The parties were married in December 1993; they had one child during the marriage. Plaintiff filed for divorce in September 2005. The parties agreed on a custody and parenting time arrangement that, in part, allowed plaintiff to move with the minor child from Midland, Michigan, to Ohio, and also established a parenting time schedule. The agreement provided that plaintiff would be responsible for all transportation of the child to visitation with defendant as long as the child's residence was more than 100 miles from defendant's residence. The parties' agreement regarding custody and parenting time was incorporated into the judgment of divorce, which was entered on November 29, 2006. The judgment of divorce provided that the parties would share joint legal and physical custody of the minor child, that plaintiff was permitted to move, with the minor child, to Ohio, and that defendant would have parenting time with the minor child two weekends per month, with plaintiff providing all transportation for the minor child to and from defendant's residence. The judgment of divorce also contained provisions regarding holiday parenting time and provided for eight weeks of summer parenting time for defendant, with plaintiff having parenting time every other weekend.

[1] The order also denied defendant's motion for change of custody, but defendant does not challenge this part of the order on appeal.

After the judgment of divorce was issued, however, both parties became dissatisfied with the custody and parenting time arrangement that they had agreed to and that had been incorporated into the judgment of divorce. In May 2008, plaintiff filed a petition to modify the order of parenting time, arguing that a change of circumstances warranted the change in parenting time. In December 2008, defendant filed a motion for change of custody, in which he sought sole physical custody of the child.

The trial court held a de novo hearing to consider the parties' competing motions. In an order entered November 30, 2009, the trial court denied defendant's motion for change of physical custody of the child, but it modified the parenting time schedule. Under the new parenting time schedule, defendant had parenting time with the child one extended weekend per month, defendant had parenting time for the entire summer, except during times when the child's sports schedule required her to be at plaintiff's home, and the parties were to equally share in the responsibility to transport the child to parenting time. By granting defendant parenting time for the entire summer, the trial court was attempting to provide defendant with the same number of days of parenting time that he should have been receiving under the parties' agreement. In denying defendant's motion for change of physical custody and modifying parenting time, the trial court did not, on the record or in its order, make explicit findings regarding the existence of proper cause or a change of circumstances or the best interests of the minor child.

Thereafter, defendant moved for reconsideration, and the trial court denied the motion. This appeal ensued.

II. STANDARD OF REVIEW

"Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against

the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction. *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2007). In child custody cases, "[a]n abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Clear legal error occurs "when the trial court errs in its choice, interpretation, or application of the existing law." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

III. ANALYSIS

A. LAW OF THE CASE

As a preliminary matter, we first address defendant's argument that the trial court was bound by the parenting time schedule in the judgment of divorce based on the law of the case doctrine. Whether the law of the case doctrine applies is a question of law that we review de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The law of the case doctrine provides that a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case " 'where the facts remain materially the same.' " *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). According to defendant, the

court was bound by its implicit determination that the parenting time agreement reached by the parties was in the best interests of the minor child.

The law of the case doctrine does not prohibit the trial court's modification of parenting time in this case. First, a determination regarding a child's best interests is not a question of law, but a question of fact. Second, the original determination of parenting time and the child's best interests was made by the trial court (pursuant to the parties' agreement), not an appellate court. Third, the facts in this case are not materially the same because at the time of the original parenting time order, the minor child was not in high school, and now she is a freshman in high school, and her social and extracurricular schedule is much busier. For these reasons, we conclude that the law of the case doctrine does not apply.

B. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Defendant next argues that the trial court erred by changing parenting time without a showing of proper cause or a change of circumstances that would warrant such a change.

The term " '[c]hild-custody determination' means a judgment, decree, or other court order providing for legal custody, physical custody, *or parenting time* with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. . . ." MCL 722.1102(c) (emphasis added). Under MCL 722.27(1)(c), a trial court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." See also *Terry v Affum (On Remand)*, 237 Mich App 522, 534-535; 603 NW2d 788 (1999) (stating that a showing of proper cause or change of circumstances is required to

modify a parenting time order). A modification of such a judgment or order is only permissible when it is in the minor child's best interests. MCL 722.27(1)(c). When a modification would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest. *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010); MCL 722.27(1)(c). If the proposed change does not change the custodial environment, however, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests. *Pierron*, 486 Mich at 93.

In *Vodvarka v Grasmeyer*, 259 Mich App 499; 512; 675 NW2d 847 (2003), this Court articulated the proper cause and change of circumstances sufficient to warrant a change of custody. According to the *Vodvarka* Court, "proper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id.* at 511. Furthermore,

> to establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. [*Id.* at 512.]

We also in *Vodvarka* articulated the change of circumstances sufficient to warrant a change of custody:

> [I]n order to establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [*Id.* at 513-514.]

In her petition to modify parenting time, plaintiff did not assert that there was proper cause to warrant a change of parenting time, but she asserted that there was a "substantial change of circumstances" because after the judgment of divorce was entered, defendant began to live with Deann Delisle, who suffered from depression and chronic pain, and Delisle would care for and supervise the minor child while defendant was away for work, sometimes for 12 hours at a time. According to plaintiff's petition, Delisle would not allow the child to use the telephone, eat food in the home or drink soft drinks, and she accused the minor child of stealing $100 from her. The petition alleged that the minor child had expressed a desire to stop parenting time with defendant until alternative arrangements could be made for her care and supervision so that she could avoid extended stays with Delisle. The only other change of circumstance alleged by plaintiff was that the current parenting time schedule did not require defendant to contribute to transportation costs, and the cost of fuel had doubled.

At the de novo hearing, the only testimony offered by plaintiff was her own. Plaintiff testified that Delisle was no longer defendant's girlfriend. Regarding other

changes of circumstances, plaintiff testified that the minor child was now in high school and was growing up and that her school and extracurricular schedules were changing. According to plaintiff, the parenting time schedule precluded the minor child from participating in certain activities. Plaintiff also testified regarding the price of gasoline.

We find that plaintiff did not present sufficient evidence to establish a change of circumstances as defined in *Vodvarka*. At the hearing, evidence was presented that Delisle was no longer defendant's girlfriend; for obvious reasons, then, defendant's relationship and residence with Delisle was not a change of circumstances. Furthermore, the fact that the minor child was growing up and wanting to participate in more social and extracurricular activities does not constitute a sufficient change of circumstances under *Vodvarka* because such changes are "normal life changes . . . that occur during the life of a child" over time, and these changes are not sufficient under *Vodvarka* to constitute a change of circumstances warranting a change in custody. *Id.* at 513. In addition, such changes are not a condition surrounding custody of the child as required under *Vodvarka*. *Id*. Similarly, the price of gas is also not a condition surrounding custody of the child. *Id.*

Concluding that plaintiff's evidence regarding a change of circumstances is not sufficient to constitute a change of circumstances under *Vodvarka* does not end the inquiry in this case, however, and we conclude that the definitions of "proper cause" and "change of circumstances" from *Vodvarka* do not control the facts of this case because this case involves a modification of parenting time rather than a change in custody. *Vodvarka* was a custody case, and this Court's definitions of

"proper cause" and "change of circumstances" in *Vodvarka* specifically related to "the child's custodial situation" and "the conditions surrounding custody of the child." *Id.* at 511, 513. Furthermore, the definitions of "proper cause" and "change of circumstances" as articulated in *Vodvarka* are guided by the best interest factors in MCL 722.23(a) through (*l*), and do not take into account the parenting time factors in MCL 722.27a(6)(a) through (i).[2] We discern nothing in the *Vodvarka* opinion that requires the standards used to determine

[2] MCL 722.27a provides, in relevant part:

> (6) The court may consider the following factors when determining the frequency, duration, and type of parenting time to be granted:
>
> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
>
> (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
>
> (e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
>
> (f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
>
> (g) Whether a parent has frequently failed to exercise reasonable parenting time.
>
> (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
>
> (i) Any other relevant factors.

the existence of proper cause or change of circumstances for custody determinations to apply to determinations regarding parenting time, absent a conclusion that a change in parenting time will result in a change in an established custodial environment. *Vodvarka*, 259 Mich App at 509. If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate. See *id.* at 509; see also *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008) (holding that a hearing is required when a modification of parenting time would change the established custodial environment). In this case, however, the trial court's modification of parenting time was not so significant that it resulted in a change in the minor child's custodial environment.[3] For rea-

[3] The judgment of divorce provided that defendant would have parenting time with the minor child for two weekends per month and eight weeks of summer parenting time, with plaintiff having parenting time every other weekend. Defendant also had parenting time every Christmas break and every spring break. The order modifying defendant's parenting time granted defendant parenting time with the minor child for one extended weekend per month during the school year, and for the entire summer, unless the child's sports schedule required her to be in plaintiff's home. The trial court granted defendant parenting time for every Christmas vacation, and ordered the parties to alternate spring breaks. The trial court stated that by effectively granting defendant parenting time for the entire summer, it was attempting "to provide him with the number of days that he should have gotten under the existing judgment of divorce which has proved unworkable." The trial court calculated that under the judgment of divorce, defendant received approximately 105 to 109 days of parenting time, whereas under the modified parenting time, defendant received approximately 100 days of parenting time. However, the trial court's calculation of the number of days of defendant's parenting time under the modified order did not take into account the fact that defendant was awarded parenting time for the entire break for every Christmas vacation. Therefore, the evidence shows that defendant received very close to the same number of parenting time days under the judgment of divorce and under the modified parenting time order. Thus, the modified parenting time did not affect the established custodial environment.

sons that will be explained below, we hold that a more expansive definition of "proper cause" or "change of circumstances" is appropriate for determinations regarding parenting time when a modification in parenting time does not alter the established custodial environment.

The *Vodvarka* definitions of "proper cause" and "change of circumstances" are inapplicable to this case, in part, because the rationale for imposing more stringent constructions on the terms "proper cause" and "change of circumstances" with respect to custody determinations is far less applicable with respect to parenting time determinations. With respect to child custody disputes, "[t]he goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). "Providing a stable environment for children that is free of unwarranted custody changes . . . is a paramount purpose of the Child Custody Act . . . ." *Vodvarka*, 259 Mich App at 511. Therefore, in the context of a child custody dispute, the purpose of the proper cause or change of circumstances requirement is "to 'erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders.' " *Id.* at 509, quoting *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995).

Such concerns do not exist, however, when a modification of parenting time does not alter the established custodial environment because determinations regarding child custody and parenting time serve different purposes. Whereas the primary concern in child custody determinations is the stability of the child's environ-

ment and avoidance of unwarranted and disruptive custody changes, the focus of parenting time is to foster a strong relationship between the child and the child's parents. See MCL 722.27a. To that end,

> [p]arenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time. [MCL 722.27a(1).]

As noted above, MCL 722.27a(6) articulates factors that the trial court "may consider . . . when determining the frequency, duration, and type of parenting time to be granted[.]"

The facts of this case present circumstances which, under *Vodvarka*, would not, and should not, constitute a sufficient change of circumstances to warrant a change of custody. Simply put, the minor child in this case is growing up; she is a freshman in high school and her school and extracurricular schedules are changing. The existing parenting schedule precluded the minor child from participating in certain activities. These are the type of normal life changes that occur during a child's life and that do not warrant a change in the child's custodial environment. *Vodvarka*, 259 Mich App at 513. However, in this case, we find that, given the geographical distance between the parties and the time necessary to transport the minor child from Ohio to Michigan to permit defendant to exercise his parenting time, such changes do constitute proper cause or change of circumstances sufficient to modify parenting time to permit the child to engage in social activities and participate in extracurricular activities, so long as the

modification in parenting time does not affect the established custodial environment.

It is notable that the Michigan Parenting Time Guideline, promulgated by the State Court Administrative Office (SCAO) for use in the state's friend of the court offices, recognizes the need for flexibility in parenting time as a child grows older:

> As child(ren) grow, they are involved in different activities. As their developmental needs change, both parents need to be flexible with their parenting time schedule and allow room for adjustment. Because continuity in activities is important, parents must be willing to alter the parenting time schedule. [Friend of the Court Bureau, Mich Supreme Court, *Michigan Parenting Time Guideline* (Lansing: State Court Admin Office), p 21.]

The Michigan Parenting Time Guideline also recognizes that a minor child's age is a factor to consider in determining parenting time:

> The age of a child(ren) is an important factor in determining the frequency and duration of parenting time. Earlier in a child(ren)'s development, the child(ren) will need more frequent contact with each parent, but the duration of the contact should be shorter. As a child(ren) becomes older, the contact may become less frequent but of greater duration. When a child(ren) reaches school age, school and associated activities along with the age of the child(ren) will need to be considered. The practical implications of the developmental stages of a child(ren) may require that schedules, including joint custody schedules, be modified. [*Id*. at 24.]

Thus, the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should take into account in making determinations regarding modification of parenting time. Therefore, we hold that, in a case where a

modification of parenting time does not alter the established custodial environment, the fact that a child has begun high school and seeks to become more involved in social and extracurricular activities (normal life changes that do not constitute a change of circumstances under *Vodvarka*) constitutes a change of circumstances sufficient to modify parenting time. In this regard, we note the fact that the parties in this case live in different states, requiring significant travelling time for the minor child to accommodate defendant's exercise of parenting time, is significant.[4] With our holding today, we do not seek to precisely define the proper cause or change of circumstances necessary to change parenting time. Our holding is limited to our conclusion that the normal life changes that occurred with the minor child in this case are sufficient to modify parenting time.

C. BEST INTERESTS

Defendant next argues that the trial court erred in modifying parenting time without considering whether the change in parenting time was in the best interests of the minor child. The child's best interests govern a court's decision regarding parenting time. MCL 722.27a(1); *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993). Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a(6), are relevant to parenting time decisions. Custody decisions require findings under all of the best interest factors, but parenting time decisions may be

[4] In determining parenting time, the court may consider "[t]he inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time." MCL 722.27a(6)(e).

made with findings on only the contested issues. *Hoffman v Hoffman*, 119 Mich App 79, 83; 326 NW2d 136 (1982).

In this case, the trial court did not explicitly address the best interest factors in MCL 722.23, nor did it need to because this modification of parenting time did not result in a change of custody. While the trial court did not explicitly address the factors in MCL 722.27a(6) in modifying defendant's parenting time, it was clear from the trial court's statements on the record that the trial court was considering the minor child's best interests in modifying defendant's parenting time. In *Powery*, 278 Mich App at 530-531, this Court recognized that the trial court's failure to explicitly state that modifying the existing custody order was in the child's best interests was not error because "such a finding can easily and clearly be drawn from the trial court's written opinion." *Id.* at 530. A finding that the modification in parenting time was in the child's best interests in this case can similarly be drawn from the trial court's statements on the record. The trial court chastised the parties on the record for making an agreement that was not in the best interests of the minor child. The trial court's modification of defendant's parenting time, which was minimal and did not significantly alter the number of defendant's parenting time days, was in the minor child's best interests because it allowed the child to participate in social activities and extracurricular activities in which she desired to participate in high school. Under these circumstances, we cannot conclude that the trial court made factual findings against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. *Pickering*, 268 Mich App at 5. Defendant is not entitled to relief on this issue.

D. MEANINGFUL PARENTING TIME

Defendant finally argues that the modified parenting time order deprives him of a reasonable opportunity to parent. In the judgment of divorce, plaintiff was required to transport the minor child from Ohio to Michigan so that defendant could exercise his parenting time with the minor child, but the order modifying parenting time required each party to transport the minor child to exercise his or her own parenting time. According to defendant, requiring him to transport the minor child would jeopardize his job as a truck driver because federal motor safety regulations restrict his driving. Defendant further argues that there was no evidence presented that three-day weekends existed or that the parties could transport the minor child on those days. Defendant has cited little authority to support his position, and he has failed to adequately brief the merits of any alleged error; therefore, we decline to address this issue. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). To the extent that the issue is preserved, we find that the trial court's order modifying parenting time and requiring the parties to transport the minor child to exercise their respective parenting time was based on a sufficient change of circumstances and was in the best interests of the minor child. Defendant's arguments in this regard are without merit.

Affirmed.

JANSEN, J. (*concurring in the result only*). I concur in the result only.

CITY OF EAST LANSING v THOMPSON

Docket No. 292239. Submitted October 8, 2010, at Lansing. Decided December 2, 2010, at 9:05 a.m.

Cassandra L. Thompson pleaded guilty in the 54-B District Court to a charge of disorderly assembly for riot, a violation of the code of ordinances of the city of East Lansing. The court, David L. Jordon, J., sentenced defendant to serve 14 days in jail and to not enter upon any public community college, public college, or public university campus for one year. Defendant appealed in the Ingham Circuit Court, challenging the part of her sentence imposing the one-year ban. The circuit court, Paula J. M. Manderfield, J., entered an order that quashed the part of the sentence regarding the one-year ban, holding that the statute that provided for the one-year ban, MCL 769.1g(1)(a)(*ii*), did not authorize such a ban for a defendant who was sentenced to incarceration. The city appealed by leave granted.

The Court of Appeals *held*:

The plain language of MCL 769.1g(1)(a)(*ii*) provides that a court may order an individual not to enter any campus for one year following the imposition of the sentence or one year following the completion of any term of incarceration. If the individual was also sentenced to a term of incarceration, the ban is in addition to the term of incarceration and does not begin to run until after the individual has completed the term of incarceration. Interpreting the statute as authorizing that those sentenced to jail would have a full year of banishment in addition to their incarceration advances the legislative purpose of imposing a campus ban on all who are convicted of any offense related to a riot, incitement to riot, unlawful assembly, or civil disorder on or within 2,500 feet of a public community college, college, or university campus, not just those who avoided incarceration. The order of the circuit court must be reversed and the district court's judgment of sentence must be reinstated.

Circuit court order reversed; district court judgment of sentence reinstated.

SENTENCES — RIOTING — INCITEMENT TO RIOT — UNLAWFUL ASSEMBLY — CIVIL DISORDER — PUBLIC COMMUNITY COLLEGES, COLLEGES, AND UNIVERSITIES — BANISHMENT FROM CAMPUSES.

A court, as part of the sentence for a conviction of any offense that the court determines was directly related to a riot, incitement to riot, unlawful assembly, or civil disorder on or within 2,500 feet of a public community college, college, or university campus in Michigan, may order the defendant not to enter any public community college, college, or university campus for one year following the imposition of the sentence or one year following the completion of any term of incarceration; if the defendant was also sentenced to a term of incarceration, the ban is in addition to the term of incarceration and does not begin to run until after the defendant completes the term of incarceration (MCL 769.1g[1][a][*ii*]).

McGinty, Hitch, Housefield, Person, Yeadon & Anderson, P.C. (by *Erin E. Housefield*), for the city of East Lansing.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

FITZGERALD, J. Plaintiff, the city of East Lansing, appeals by leave granted the circuit court's order that quashed the district court's imposition of a one-year ban on entering a public college or university campus as part of defendant's sentence for riotous behavior. We reverse the circuit court's order and affirm and reinstate the district court's judgment of sentence.

On August 22, 2008, defendant pleaded guilty in the district court to a charge of disorderly assembly for riot, a violation of § 26-52(10) of the disorderly conduct division of the code of ordinances of the city of East Lansing. She testified at her plea proceeding that she was present at a riot at the Cedar Street festival in East Lansing on April 5, 2008, and remained there with the intent of advancing the purpose of the riot. Before taking defendant's plea, the district court informed her of the potential punishment, including imprisonment

and, pursuant to MCL 769.1g(1)(a)(*ii*), being "ordered not to enter the campus of any institution of higher learning in the State of Michigan that's publicly supported for up to a year."

Although defendant initially challenged whether MCL 769.1g applied to this case, she withdrew her challenge at sentencing. The district court sentenced defendant to serve 14 days in jail and to observe a one-year ban from public college, university, and community college campuses. Because defendant was in the midst of a semester at Michigan State University at the time of sentencing, the district court postponed the start of the one-year ban until after the semester ended.

On appeal in the circuit court, defendant challenged that part of her sentence banning her from public college, university, and community college campuses.[1] The circuit court ruled that the district court abused its discretion by interpreting the statute as authorizing a one-year campus ban for a defendant who is incarcerated. Plaintiff sought and was granted leave to appeal in this Court.[2] The sole question before this Court is whether MCL 769.1g(1)(a)(*ii*) authorizes a one-year campus ban for a defendant who is incarcerated, or whether the campus ban is limited to the term of incarceration.

In interpreting a statute, a court's goal is to give effect to the Legislature's intent. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). A court may not construe a statute unless it is ambiguous; if the statute is unambiguous, the court will apply it as written. *Id.* If a statute is ambiguous, construction is

[1] Defendant also challenged the denial of youthful-trainee status; no issues regarding that denial are before us in this appeal.

[2] *East Lansing v Thompson*, unpublished order of the Court of Appeals, entered October 6, 2009 (Docket No. 292239).

permitted, and the rules of statutory construction "merely serve as guides" toward the ultimate goal of discerning the intent of the Legislature. *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 313; 683 NW2d 148 (2004). "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (citation omitted).

MCL 769.1g(1)(a)(*ii*), provides:

> As part of the sentence for a conviction for any offense that the court determines was directly related to a riot, incitement to riot, unlawful assembly or civil disorder on or within 2,500 feet of a public community college, public college, or public university campus in this state, the following apply:
>
> (a) The court may order the individual not to enter upon any public community college, public college, or public university campus in this state as follows:
>
> * * *
>
> (*ii*) If the offense is a misdemeanor, for 1 year following the imposition of sentence or, if the person is ordered incarcerated for the violation, the completion of the term of incarceration.

The plain and unambiguous language of the statute provides that the court "may order the individual not to enter upon any . . . campus . . . for" (1) one year following the imposition of sentence *or* (2) one year following the completion of any term of incarceration. Thus, if the person is also sentenced to a term of incarceration, the ban would be in addition to the term of incarceration and would not begin to run until *after* the person had completed his or her term of incarceration.

The circuit court interpreted the language in MCL 769.1g(1)(a)(*ii*) to mean that the court may order the individual not to enter upon any campus for (1) one year following the imposition of sentence *or* (2) if the person is ordered incarcerated for the violation, the completion of the term of incarceration. Thus, the circuit court concluded that a defendant who is ordered incarcerated for the violation is prohibited from entering upon the campus of any public community college, public college, or public university in this state only during the period of incarceration. In other words, the circuit court concluded that the ban applies only to those defendants who are not ordered incarcerated for the violation.

The circuit court's interpretation does not make grammatical, or syntactical, sense. "[T]he completion of the term of incarceration" refers not to a time period, but to an event, or moment. Likewise, "the imposition of sentence" is an event. Both references serve the grammatical purpose of marking when the campus ban may begin. This Court presumes that the Legislature knows the rules of grammar. *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998); *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009).

Even assuming a statutory ambiguity, this Court must choose the interpretation that "more faithfully advances the legislative purpose behind the statute." *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996). The bill that became MCL 769.1g was intended to alleviate the problem of campus rioting by "provid-[ing] a serious punishment—banishment from public college and university campuses—for people who are involved in future incidents of rioting . . . ." House

Legislative Analysis, SB 525, November 4, 1999. That purpose is reflected in the plain language of MCL 769.1g. To read the statute, as the circuit court did, as authorizing a one-year ban for those not incarcerated, but allowing effectively no campus ban for those who are incarcerated (those who presumably commit the most serious infractions), would hobble, not advance, the legislative purpose. Rather, reading the statute as authorizing that those sentenced to jail would have a full year of banishment in addition to their incarceration advances the legislative purpose of imposing a campus ban on all who are convicted of the state crimes, not just those who avoid incarceration.

The circuit court erred by concluding that MCL 769.1g(1)(a)(*ii*) does not allow for a one-year campus ban running from the completion of incarceration. We reverse the circuit court's order that quashed that part of the district court's judgment of sentence that imposed a one-year band on entering a public college or university campus. The district court's judgment of sentence is reinstated in its entirety.

COMERICA BANK v COHEN

Docket No. 293327. Submitted October 12, 2010, at Detroit. Decided October 21, 2010. Approved for publication December 2, 2010, at 9:10 a.m.

Comerica Bank brought suit in the Oakland Circuit Court, seeking to enforce a limited loan guaranty against the guarantor, Walter Cohen. Defendant had signed the guaranty as part of a real estate loan transaction between plaintiff and the company defendant managed, 21 Century Arizona Monteil LLC. After plaintiff demanded payment on the loan and the borrower failed to pay, plaintiff sent the borrower notice of default and then filed suit. The court, Lisa O. Gorcyca, J., granted plaintiff's motion for summary disposition, finding the terms of the guaranty were unambiguous and did not allow defendant's obligation to be satisfied by a partial payment from the borrower pursuant to a prospective sale of the property. The court also found that even if the property were sold, that would not reduce defendant's liability under the guaranty because under its terms defendant would be released from liability only upon payment in full of his guaranteed percentage of the loan. Defendant appealed.

The Court of Appeals *held*:

1. A guaranty of payment is absolute while a guaranty of collection is conditional and becomes fixed only if the creditor exercises reasonable diligence in collecting from the principal debtor. According to the unambiguous terms of the guaranty, Cohen unconditionally guaranteed payment of 30 percent of the outstanding indebtedness owed by 21 Century at any time, payable on demand if the borrower failed to pay the principal or interest on the loan. The terms also unambiguously stated that plaintiff had no obligation to perfect its lien on the property or to secure payment of the indebtedness and that defendant waived any right to require plaintiff to do so. Even if the property had been sold or foreclosed, the evidence showed that the money this would generate would not result in plaintiff recovering more than 100 percent of the indebtedness after defendant paid in full.

2. In a case in which the guarantor is entitled to notice, a failure to give notice of the principal's default does not discharge the

guarantor unless the guarantor has actual loss or damages, and then only the amount of loss or damage is discharged. Defendant was not relieved of his obligation under the guaranty due to lack of notice. The unambiguous terms of the guaranty provided that, other than any notice rights provided by the loan agreement itself, defendant waived notice of default and notice to accelerate or demand payment, and the loan agreement contained no provisions for notice to the guarantor. Even if he were entitled to notice and was not given notice, he did not claim that he suffered damages from the lack of notice.

3. Although summary disposition under MCR 2.116(C)(10) is usually not properly granted until the parties have had a chance for discovery, it may be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. The meaning of the guaranty was clear on its face and discovery was not needed to discern the parties' intent. The trial court properly granted summary disposition without allowing further discovery.

Affirmed.

1. CONTRACTS — GUARANTY CONTRACTS — GUARANTY OF PAYMENT.

A guaranty of payment is absolute while a guaranty of collection is conditional and becomes fixed only if the creditor exercises reasonable diligence in collecting from the principal debtor; when the unambiguous terms of a guaranty unconditionally guarantee payment, the creditor has no obligation to the guarantor to attempt to enforce the loan terms against the borrower.

2. CONTRACTS — GUARANTY CONTRACTS — NOTICE TO GUARANTOR.

In a case in which the guarantor is entitled to notice, a failure to give notice of the principal's default does not discharge the guarantor unless the guarantor has actual loss or damages, and then only the amount of loss or damage is discharged.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Steven A. Roach* and *Douglas W. Eyre*), for plaintiff.

Honigman Miller Schwartz and Cohn LLP (by *Mark A. Stern* and *Jill M. Przybylski*) for defendant.

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM. Defendant, Walter Cohen, appeals as of right a judgment entered in favor of plaintiff, Comerica Bank, in this contract dispute. On appeal, defendant challenges the circuit court's order granting plaintiff's motion for summary disposition plaintiff. We affirm.

I. FACTS

As noted in the preceding paragraph, this is a contract dispute. On August 1, 2006, plaintiff and 21 Century Arizona Monteil LLC, entered into a loan agreement. The agreement specified that defendant, manager of 21 Century, was the guarantor. The agreement further specified that the term "loan" referred to "an equity loan in the amount of $226,750 . . . and an acquisition and renovation loan in the amount of $10,640,000." The maturity date was February 1, 2009.

Pursuant to ¶ 6.1(a) of the loan agreement, an event of default is, inter alia:

> If a Borrower shall fail to pay the principal of and/or interest on the Loan or if a Borrower shall fail to pay any other monetary obligation as provided for in this Agreement or under any other Loan Document, and in any such case, any such failure shall continue for a period of five (5) days after written notice thereof shall have been given to Borrower by Lender.

The notice provision, ¶ 8.3, states:

> Any notice, demand, request or other instrument which may be or is required to be given under this Agreement shall be given to the parties at their addresses appearing on the cover page hereof. . . . A copy of any default notices sent to Borrower shall also be sent to Borrower's attorney:
>
> Gregory J. DeMars, Esq.
>
> Honigman Miller Schwartz and Cohn LLP . . . .

Also on August 1, 2006, defendant executed a limited guaranty, which first stated:

> As of August 1, 2006 the undersigned . . . unconditionally and absolutely guarantee(s) to [plaintiff] . . . payment when due, whether by stated maturity, demand, acceleration or otherwise, of all existing and future indebtedness to [plaintiff] of 21 Century . . . arising under that certain Floating Non-Revolving Eurodollar Note, in the principal amount of $10,640,000 . . . .

Interest and costs of collection were also included in the guarantor's obligation pursuant to ¶ 1. Paragraph 2 of the limited guaranty specified, "This is a continuing Guaranty of payment and not of collection and remains effective whether the Indebtedness is from time to time reduced and later readvanced or entirely extinguished and later reincurred."

In addition, ¶ 7 of the limited guaranty provides, "The undersigned waive(s) any right to require the Bank to (a) proceed against Borrower, any property or collateral . . . or (c) pursue any other remedy in the Bank's power." Finally, ¶ 13(a) of the limited guaranty specifies that

> [n]otwithstanding anything to the contrary contained herein, the obligations of the Guarantor hereunder shall be limited to 30% of the indebtedness outstanding from time to time under the Note, the Loan Agreement and/or the Loan Documents and 100% of the indebtedness outstanding from time to time under the Equity Note plus interest thereon and the cost of collection thereof. Upon payment in full of its percentage share (as set forth above), Guarantor shall be released from liability hereunder . . . .

On February 3, 2009, plaintiff filed a complaint alleging that 21 Century defaulted on the loan.[1] Plaintiff demanded payment in a letter dated December 31,

[1] As noted, the loan's maturity date was February 1, 2009.

2008; however, defendant and 21 Century failed to pay. Thus, plaintiff asserted that, pursuant to the guaranty, defendant was required to pay a portion of 21 Century's outstanding indebtedness, which amounted to $8,379,173.89 in principal and $165,610.67 in interest, as of January 30, 2009. Plaintiff requested that it be granted judgment against defendant in the amount of $2,513,752.19 in principal and $49,683.20 in accrued interest.

Defendant filed an answer on March 24, 2009, asserting, first, that plaintiff failed to mitigate its alleged damages by not approving a proposed sale of the property. Second, plaintiff failed to give proper notice of default to defendant's attorney under the terms of the loan agreement and note, and therefore, neither 21 Century nor defendant was in default. Third, since defendant's guaranty was limited to a portion of the debt, defendant's obligation would be satisfied by the sale and proceeds from a proposed sale of the real estate collateral.

On April 22, 2009, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court held a hearing on plaintiff's motion on May 27, 2009, and on June 2, 2009, the trial court entered an opinion and order granting plaintiff's motion for summary disposition. The court first stated that the terms of the guaranty were clear and unambiguous, and therefore, the court found "no merit in Defendant's contention that his obligation under the Guaranty would be satisfied by partial payment by the Borrower pursuant to a prospective sale of the Condominium Project securing the Note." The court further ruled:

> In any case, acceleration of the indebtedness owed under the Note is not material: the Note matured and was due and payable in full on February 1, 2009. If Plaintiff

> receives any amount from a sale of the Condominium Project, that amount will not reduce the liability owed by Defendant under the Guaranty. Indeed, the Guaranty is an independent obligation owed by Defendant to Plaintiff. The Guaranty provides at ¶ 13(a): "Upon payment in full of its percentage share . . . Guarantor shall be released from liability hereunder."

Judgment for plaintiff was entered on July 9, 2009, and this appeal ensued.

II. ANALYSIS

Defendant first argues that the trial court erred in granting summary disposition to plaintiff because the court improperly interpreted the limited guaranty at issue.

Plaintiff brought its motion for summary disposition pursuant to MCR 2.116(C)(10). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews

> a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. [*Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).]

"There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving

party." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). In addition, "[t]he construction and interpretation of a contract present questions of law that we review de novo." *Saint Clair Medical, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006).

"Contracts of guaranty are to be construed like other contracts, and the intent of the parties, as collected from the whole instrument and the subject-matter to which it applies, is to govern." *First Nat'l Bank v Redford Chevrolet Co*, 270 Mich 116, 121; 258 NW 221 (1935) (quotation marks and citation omitted). When interpreting a contract,

> if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [*Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (citations omitted).]

In addition,

> a contract is to be construed as a whole; . . . all its parts are to be harmonized so far as reasonably possible; . . . every word in it is to be given effect, if possible; and . . . no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable. [*Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 358; 764 NW2d 304 (2009) (quotation marks and citation omitted).]

It should also be noted that

> a guaranty contract—like a surety contract—is a special kind of contract. . . . The undertaking of a surety is to

> receive a strict interpretation. The surety has a right to stand on the very terms of the contract. . . . A surety cannot be held beyond the precise terms of his agreement. [*Bandit Indus, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511-512; 620 NW2d 531 (2001) (quotation marks and citations omitted).]

Nevertheless,

> [t]he main distinction between a contract of suretyship and of guaranty . . . is that while the surety assumes liability as a regular party to the primary undertaking, the guarantor does not, as his or her liability depends on *an independent collateral agreement* by which he or she undertakes to pay the obligation if the primary payor fails to do so. [*Id*. at 507-508 n 4 (emphasis added, quotation marks and citation omitted).]

Defendant argues that the trial court's finding—that defendant does not receive credit for any outside payment that is made in satisfaction of the indebtedness, and that, absent defendant's personal payment of the full 30 percent share, defendant will not be released from the guaranty—is illogical. According to defendant, the trial court's interpretation could be supported only by adding the bracketed words to the guaranty: "Upon payment in full of its percentage share (as set forth above) [by guarantor], Guarantor shall be released from liability hereunder," and this interpretation violates the basic principle of contract law that courts are not permitted to rewrite contracts by adding additional terms. In addition, defendant argues that, pursuant to *Chabut v Chabut*, 66 Mich App 440; 239 NW2d 401 (1976), plaintiff was required to foreclose on the condominium project before collecting on the guaranty, and furthermore, requiring foreclosure is a fair construction of the guaranty, as evidenced by the language of ¶ 13(a). Similarly, according to defendant, there is nothing in the guaranty that relieves plaintiff of its legal obligation to mitigate damages.

The plain language of the limited guarantee forecloses defendant's arguments. As noted in part I of this opinion, the agreement specified that defendant was the guarantor, and the limited guaranty clearly states the unconditional obligation undertaken by defendant:

> As of August 1, 2006 the undersigned . . . *unconditionally and absolutely gurantee(s)* to [plaintiff] . . . *payment when due*, *whether by stated maturity, demand, acceleration or otherwise*, of all existing and future indebtedness to [plaintiff] of 21 Century . . . arising under that certain Floating Non-Revolving Eurodollar Note, in the principal amount of $10,640,000 . . . . [Emphasis added.]

Paragraph 2 of the limited guaranty further specified, "*This is a continuing Guaranty of payment and not of collection* . . . ." Such a guaranty of *payment* is absolute under the terms of the contract and settled case law. *Bastian Bros Co v Brown*, 293 Mich 242, 248; 291 NW 644 (1940). It is a guaranty of *collection*, not applicable here, that "is conditional and becomes fixed only if the creditor exercises reasonable diligence in collecting from the principal debtor. Reasonable diligence in cases of guaranties of collection demands that, unless there are mitigating circumstances, the creditor prosecute to judgment and return of execution thereof unsatisfied." *Id*. at 248-249 (citations omitted).

The unconditional nature of defendant's obligation is further clarified by ¶¶ 4 and 7 of the guaranty. Paragraph 4 states in relevant part:

> The undersigned agree(s) that *no security now or later held by the Bank for the payment of the Indebtedness*, whether from the Borrower, any guarantor, or otherwise, and whether in the nature of a security interest, pledge, lien, assignment, setoff, suretyship, guaranty, indemnity, insurance or otherwise, *shall affect in any manner the unconditional obligation of the undersigned under this*

> *Guaranty*. The undersigned acknowledge(s) and agree(s) that *the Bank has no obligation to acquire or perfect any lien on or security interest in any asset(s), whether realty or personalty, to secure payment of the Indebtedness*, and the undersigned is (are) not relying upon any asset(s) in which the Bank has or may have a lien or security interest for payment of the Indebtedness. [Emphasis added.]

And, pursuant to ¶ 7 of the agreement, defendant "*waive(s) any right to require the Bank to: (a) proceed against Borrower, any property or collateral* . . . or (c) pursue any other remedy in the Bank's power." Finally, ¶ 13(a) of the guaranty details defendant's specific obligation:

> Notwithstanding anything to the contrary contained herein, *the obligations of the Guarantor hereunder shall be limited to 30% of the indebtedness* outstanding from time to time under the Note, the Loan Agreement and/or the Loan Documents and 100% of the indebtedness outstanding from time to time under the Equity Note plus interest thereon and the cost of collection thereof. *Upon payment in full of its percentage share (as set forth above), Guarantor shall be released from liability hereunder* . . . ." [Emphasis added.]

Thus, by the plain language of the guaranty, defendant unconditionally and absolutely agreed to pay 30 percent of the indebtedness and plaintiff was not required to foreclose on the real estate or proceed against other collateral before seeking payment from defendant. Furthermore, even if plaintiff *did* collect money through foreclosure, plaintiff would not be required to offset those funds against the money due from defendant unless the payment by defendant would result in recovery of more than 100 percent of the indebtedness. See *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 92; 443 NW2d 451 (1989) ("[A] plaintiff may simultaneously

pursue all of his remedies . . . *so long as plaintiff is not awarded double recovery.*") (quotation marks and citation omitted).

Although defendant relies on *Chabut* to support his position that plaintiff was first required to foreclose on the real estate, *Chabut* addressed a suretyship, which, as explained in *Bandit Indus*, 463 Mich at 507 n 4, is not the same thing as a contract of guaranty. Therefore, *Chabut*'s holding that "a creditor must, in satisfaction of a debt, proceed against the collateral in such a fashion so as to protect the rights of an accommodation endorser" is inapplicable. *Chabut*, 66 Mich App at 453.[2] Additionally, applying the holding in *Chabut* to this case would cause a conflict with the agreed-upon language in ¶¶ 4 and 7.

Furthermore, while it is true that, "[i]n both contract and tort actions, an injured party must make every reasonable effort to minimize damages," *Bak v Citizens Ins Co*, 199 Mich App 730, 736; 503 NW2d 94 (1993), by defendant's own admission, the alleged proposed sale of the real estate[3] would have garnered slightly less than

[2] Defendant also repeats his argument that plaintiff was required to foreclose on the real estate by couching it in terms of mitigation of damages. Defendant cites *First Macomb Mtg Co v Schwartz*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 1997 (Docket Nos. 173988 and 176208), for the proposition that plaintiff was required to mitigate damages. However, "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). Furthermore, *First Macomb* dealt with a situation where the plaintiff bank "was aware that the property was steadily declining in value through its inspections of the property yet did not notify [defendant guarantor] of the destruction and waste of the residence until over a year after it was known to [the bank]." *First Macomb*, unpub op at 1. Such a situation is not present here.

[3] Defendant alleges that plaintiff refused to consider the proposed sale of the real estate, while plaintiff states, "the sale failed to close because the prospective purchaser could not obtain financing for the purchase . . . and not because of any action or inaction by [plaintiff]."

70 percent of the total indebtedness. Therefore, there would still have been 30 percent of the indebtedness remaining, which, as has been discussed, happens to equal the amount that defendant owes under the guaranty. Regardless, as stated above, pursuant to the guaranty defendant's obligation is an absolute guaranty of payment and plaintiff was not required to foreclose on the real estate before proceeding against defendant. *Bastian Bros Co*, 293 Mich at 248.

Defendant next argues that the trial court erred in granting summary disposition when there was no default under the loan agreement at the time the complaint was filed. Specifically, defendant argues that, while plaintiff sent 21 Century a notice of default dated December 31, 2008, it did not send a copy of the notice of default to the company's attorney at the time. Instead, plaintiff sent a copy of the notice to the attorney on or about April 3, 2009, which was after plaintiff filed the lawsuit on February 3, 2009. Defendant thus concludes that, when plaintiff filed this action, there was no payment default under the loan agreement and no default under the limited guaranty on which this case is based. Again, defendant's argument cannot prevail in light of the contract language.

Pursuant to ¶ 6.1 of the loan agreement, an event of default is defined as:

> (a) If a Borrower shall fail to pay the principal of and/or interest on the Loan or if a Borrower shall fail to pay any other monetary obligation as provided for in this Agreement or under any other Loan Document, and in any such case, any such failure shall continue for a period of five (5) days after written notice thereof shall have been given to Borrower by Lender.

* * *

> (l) If a Borrower or any Guarantor shall repudiate, terminate or revoke . . . any obligation to the Lender under a Loan Document.

According to ¶ 6.2(b), if an event of default occurs, plaintiff is entitled to "declare the entire outstanding principal balance of the Loan . . . together with all interest thereon, to be due and payable immediately." Further, ¶ 6.3 states:

> [F]rom and after the occurrence of any Event of Default under this Agreement or any event which automatically causes the indebtedness outstanding hereunder to become immediately due and payable, notwithstanding anything to the contrary in this Agreement, said indebtedness shall bear interest at the per annum rate of three (3) percentage points above the otherwise effective interest rate.

Paragraph 8.3, the notice provision of the loan agreement, states:

> Any notice, demand, request or other instrument which may be or is required to be given under this Agreement shall be given to the parties at their addresses appearing on the cover page hereof. . . . *A copy of any default notices sent to Borrower shall also be sent to Borrower's attorney:*
>
> *Gregory J. DeMars, Esq.*
>
> *Honigman Miller Schwartz and Cohn LLP* . . . . [Emphasis added.]

The corresponding notice provision in the guaranty, ¶ 7, states, "Except as to any applicable notice . . . rights set forth in the Loan Documents, the undersigned waive(s) notice of . . . default, notice of intent to accelerate or demand payment of the Indebtedness . . . ."

First, whether lack of proper notice to 21 Century's attorney meant the loan was not actually in default on December 31, 2008, does not, as plaintiff asserts, affect

defendant's obligation. The loan was due on February 1, 2009, and was not paid. The complaint was filed on February 3, 2009. As stated in the guaranty, defendant "unconditionally and absolutely guarantee(s) to [plaintiff] . . . payment when due, *whether by stated maturity*, demand, acceleration or otherwise, of all existing and future indebtedness to [plaintiff] of 21 Century . . . ." Therefore, defendant was not relieved of his obligation under the guaranty and the court did not err in granting summary disposition to plaintiff because of any alleged lack of notice. Second, it is, in any event, not at all clear from the wording of the notice provision that notice to 21 Century is ineffective simply because the attorney was not timely copied. Moreover, the loan agreement does not address notice to the guarantor, and the guaranty agreement indicates that notice to the guarantor is otherwise waived. Defendant does not and cannot dispute that he, personally, received notice of default. The demand letter, in fact, is addressed to defendant in his capacity as both manager of 21 Century and as guarantor. Defendant signed the return receipt for the letter on January 5, 2009.

Further, even if defendant, as guarantor, had not immediately received notice of default, which he clearly did,

> [a] failure to give notice of the principal's default or negligence in giving such notice, in a case where the guarantor is entitled to notice, does not of itself discharge him from liability and bar a recovery upon the guaranty; but there must be not only a want of notice within a reasonable time, but also some actual loss or damage thereby caused to the guarantor, and if such loss or damage does not go to the whole amount of the claim, but is only in part, the guarantor is discharged only *pro tanto*. [*Palmer v Schrage*, 258 Mich 560, 570; 242 NW 751 (1932) (quotation marks and citation omitted).]

See also *Piasecki v Fidelity Corp of Mich*, 339 Mich 328, 337; 63 NW2d 671 (1954) ("[T]he guarantor of *payment*, not a party to the original note, cannot complain of laches, or want of notice, unless it has worked to his prejudice . . . .") (quotation marks and citation omitted). Defendant has not claimed that he suffered damages[4] from an alleged lack of notice, and therefore, his obligation under the guaranty is not discharged.

Defendant next argues that the trial court erred in granting summary disposition before the close of discovery. Although a motion brought under MCR 2.116(C)(10) is usually not properly granted until the parties have had a chance for discovery, " 'summary disposition may . . . be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position.' " *Stringwell v Ann Arbor Pub Sch Dist*, 262 Mich App 709, 714; 686 NW2d 825 (2004), quoting *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003).

We reject defendant's argument that granting plaintiff's motion was premature. First, regarding defendant's contention that further discovery would yield evidence regarding the meaning of the guaranty, "[c]ontracts of guaranty are to be construed like other contracts," *First Nat'l Bank*, 270 Mich at 121 (quotation marks and citation omitted), and "[u]nder ordinary contract principles, if contractual language is clear,

[4] Plaintiff argues that defendant was not injured by any lack of notice of default prior to the maturity date because the judgment entered in favor of plaintiff included default interest accrued only after maturity of the note on February 1, 2009. The judgment provides that defendant must pay interest accrued through July 7, 2009, in the amount of $82,179.69. Although we are unable to determine from the record which interest rate was charged at which time, defendant does not argue on appeal that the amount of interest was improperly calculated.

construction of the contract is a question of law for the court," *Meagher*, 222 Mich App at 721. For all the reasons stated above, the meaning of the guaranty is clear and unambiguous, and discovery is not needed to uncover evidence regarding the parties' intent. Second, because mitigation of damages, i.e., a foreclosure proceeding, was not required pursuant to the unambiguous terms of the guaranty, discovery was not needed on this issue, either. Finally, regarding lack of notice, as explained above, defendant did receive notice, and even if he did not, he has not claimed that he was prejudiced in any way by any alleged lack of notice, and therefore, he is not relieved of his obligation under the guaranty. Therefore, the trial court did not err in granting plaintiff's motion for summary disposition before the close of discovery.

Affirmed. Plaintiff may tax costs, having prevailed in full. MCR 7.219(A).

PEOPLE v LECHLEITNER

Docket No. 293577. Submitted October 7, 2010, at Detroit. Decided December 7, 2010, at 9:00 a.m.

Matthew R. Lechleitner was convicted following a bench trial in the Ingham Circuit Court of operating a motor vehicle while under the influence of alcoholic liquor and causing death, MCL 257.625(4). The court, William E. Collette, J., sentenced defendant as a second-offense habitual offender to 43 to 270 months in prison. Defendant appealed, contending that the court applied an incorrect definition of the term "operate" in concluding that defendant was operating his vehicle at the time in question and erroneously scored offense variable (OV) 9, MCL 777.39, which concerns the number of victims.

The Court of Appeals *held*:

1. The trial court, in concluding that defendant was operating his vehicle at the relevant time, properly followed *People v Wood*, 450 Mich 399 (1995), which stated that "operating" must be defined in terms of the danger that MCL 257.625 seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor or a controlled substance with other persons or property. The *Wood* court additionally stated that once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk. MCL 257.625(4) does not require that the defendant's vehicle be in motion at the time of the accident, but rather that the victim's death be caused by the defendant's operation of the vehicle while intoxicated. In this case, defendant was intoxicated, operated his vehicle, and crashed it, with the result that it sat in the middle of the freeway at night creating a risk of injury or death to others.

2. The trial court correctly identified a total of four victims for purposes of scoring OV 9. Those victims were the driver (the decedent) and the passenger of the vehicle that stopped out of concern following defendant's accident and the driver and passen-

ger of another vehicle that swerved to avoid plaintiff's vehicle and struck the vehicle that had stopped, killing the driver of the stopped vehicle.

Affirmed.

WILDER, P.J., concurring, wrote separately in order to decline to join the majority's comments concerning the use of dictionaries to interpret a statute, which fail to fully acknowledge the established rules concerning the subject.

1. CRIMINAL LAW — MOTOR VEHICLES — OPERATION OF MOTOR VEHICLES WHILE UNDER THE INFLUENCE OF ALCOHOLIC LIQUOR OR CONTROLLED SUBSTANCES — WORDS AND PHRASES — OPERATING.

The term "operating" in the statute prohibiting operation of a motor vehicle while under the influence of or visibly impaired by alcoholic liquor or a controlled substance must be defined in terms of the danger that the statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of or visibly impaired by alcoholic liquor or a controlled substance with other persons or property; once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk (MCL 256.625).

2. CRIMINAL LAW — MOTOR VEHICLES — OPERATION OF MOTOR VEHICLES WHILE UNDER THE INFLUENCE OF ALCOHOLIC LIQUOR OR CONTROLLED SUBSTANCES AND CAUSING DEATH — MOVEMENT OF VEHICLE AT TIME OF ACCIDENT.

The statute that provides that a person may be convicted when the person operates a motor vehicle while under the influence of or visibly impaired by alcoholic liquor or a controlled substance and by the operation of the vehicle causes the death of another person does not require that the defendant's vehicle be in motion at the time of the accident causing the death, but rather that the victim's death be caused by the defendant's operation of the vehicle while intoxicated (MCL 257.625[4]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, *Guy L. Sweet*, Appellate Division Chief, and *John J. Murray*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Christopher M. Smith*) for defendant.

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM. Defendant appeals as of right his conviction of and sentence for operating a motor vehicle while under the influence of alcoholic liquor and causing death, MCL 257.625(4). The circuit court sentenced defendant as a second-offense habitual offender, MCL 769.10, to serve a term of imprisonment of 43 to 270 months. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from a traffic accident that occurred during the early morning hours of November 22, 2007. The parties stipulated that defendant's blood alcohol content was 0.12 grams of alcohol per 100 milliliters of blood.[1] According to the testimony, during the time his blood alcohol content exceeded the statutory limit, defendant drove his truck on a slippery freeway surface and lost control. The truck struck the right guardrail, then the left guardrail, and then stopped in the middle of the freeway, taking up two lanes. Defendant turned off his headlights and activated his hazard lights, then opened the door and attempted to propel the truck out of harm's way with his leg. Another driver with a passenger in his vehicle swerved to miss the truck, then stopped on the shoulder out of concern for the accident. Then a third car, which also had a driver and a passenger, swerved to avoid defendant's truck and, in so doing, struck the vehicle that had stopped on the shoulder, killing that driver.

[1] This is well over the proscribed limit of "0.08 grams or more per 100 milliliters of blood . . . ." MCL 257.625(1)(b).

On appeal, defendant argues that the trial court applied an incorrect definition of "operate" in concluding that defendant was operating his vehicle at the time in question and that the court erroneously scored one of the offense variables under the sentencing guidelines.

Statutory interpretation is a question of law calling for review de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). However, defendant admits that this issue is unpreserved. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). When plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

MCL 257.625(4) sets forth penalties for a person who "operates a motor vehicle" while intoxicated "and by the operation of that motor vehicle causes the death of another person . . . ." MCL 257.35a defines "operate" and "operating" as "being in actual physical control of a vehicle . . . ." MCL 257.36 defines "operator" as "every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway."

In explaining its views regarding operation and causation, the trial court stated as follows:

> [A] person who places a motor vehicle in motion or in a position posing a significant risk of causing a collision, remains responsible for that motor vehicle until such time as that vehicle is put into some position where it poses no risk to other drivers. In other words, we cannot simply stop our car in the middle of the road for whatever reason, in this case striking the curbs or striking the sides, but we can't just stop our car in the middle of the road, stagger off somewhere, standing somewhere else, and expect our li-

> ability for that vehicle to end. People are responsible for placing that vehicle in a proper environment.
>
> Now, the only exceptions to that would be in situations where there was a grossly negligent act by another citizen or some type of emergency occurs . . . . But basically, ordinary negligence by other citizens does not cause a person otherwise responsible for a serious breach of the law to be not liable.[2]

On appeal, defendant concedes that the trial court addressed the issue of what constituted operation of a vehicle so as to comport with our Supreme Court's opinion in *People v Wood*, 450 Mich 399; 538 NW2d 351 (1995). In that case, the Court stated that "operating" must be defined "in terms of the danger the OUIL statute [MCL 257.625] seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property." *Id.* at 404. Accordingly, "[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." *Id.* at 404-405.

This is consistent with both the language and the purpose of MCL 257.625(4). The statute provides that a defendant may be convicted when he or she "operates a motor vehicle" while intoxicated and "by the operation of that motor vehicle causes the death of another person . . . ." The statute does not require that the defendant's vehicle be in motion at the time of the accident, but rather that the victim's death be caused by the defendant's operation of the vehicle while intoxicated. In this case, defendant was intoxicated, operated his vehicle, and crashed it, with the result that it sat in the middle of the freeway at night creating a risk of injury or death to others.

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[2] This case contains no allegation of intervening gross negligence.

Defendant disparages the reasoning of *Wood* as "outmoded" and suggests instead that we adopt the definition of "operation" employed in a lay dictionary, i.e. "to cause to function." Defendant argues that, because after the crash his vehicle was no longer capable of functioning, defendant could not "cause" it to "function" and so, by definition, defendant could not have operated it. As just noted, we reject this argument as injecting a temporal component into the statute that is not present. Moreover, defendant's suggestion that we rely preeminently upon a lay dictionary to determine how to apply a statute ignores the axiom that the first requirement of statutory interpretation is to determine the intent of the Legislature. Certainly, a dictionary is one of the arrows in a court's quiver regarding statutory interpretation, but it is not the only one, nor is it necessarily the one that will bring the interpreting court closest to the Legislature's target. Moreover, reliance on a single dictionary definition fails to take into account the reality that there are many dictionaries of the English language while there is only one Michigan Legislature. We should not confuse the reference to a particular dictionary definition by the proponent of a certain result with the demanding task of statutory interpretation that judges are expected to perform using the available data and time-tested rules of construction.

Thus, we conclude that *Wood* remains good law and that the trial court properly followed it, and we affirm defendant's conviction.[3]

Defendant also challenges the scoring of offense variable (OV) 9, MCL 777.39, which concerns the num-

[3] We also note that, as recently as 2007, our Supreme Court adopted a broader interpretation of "operate" than defendant suggests when it concluded that "[t]he loading and unloading of passengers is an action within the 'operation' of a shuttle bus." *Martin v Rapid Inter-Urban Partnership*, 480 Mich 936 (2007).

ber of victims. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, to the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

A score of 10 points is prescribed where "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). In rejecting defense counsel's challenge to the assessment of 10 points for this variable at sentencing, the trial court explained, "the other gentleman who was trying to assist [defendant] was in a place of danger. And . . . the people driving the other vehicle that had to swerve around everything were in a potentially dangerous situations because of it . . . ."

Defendant relies on *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), to argue that OV 9 should have been scored at zero points, because only the person who died had been placed in danger. However, *McGraw* is plainly distinguishable. In that case, the sentencing offense was breaking and entering a general store and the trial court assessed 10 points for OV 9 on the ground that, in addition to the owner of the store, there were two additional victims placed in danger when the defendant drove from the scene of the offense with two passengers in his vehicle, was thereafter spotted and chased by the police, and crashed his car. *Id.* at 132-133. Our Supreme Court held that the transactional approach to scoring OV 9 was not appropriate. *Id.* at 133. "OV 9 does not provide for consideration of conduct after completion of the sentencing offense," and thus it

had to be scored in that case "solely on the basis of defendant's conduct during the breaking and entering." *Id.* at 133-134.

Using the *McGraw* approach, we conclude that defendant's intoxication and the fatal car collision endangered not only the person who died, but also both occupants of the car that struck that person; obviously, those three persons faced a serious risk of physical harm simultaneously. Further, there was also a passenger traveling with the decedent. While he was uninjured, he was also placed in danger.

Thus, the trial court correctly identified a total of four victims, resulting in a score of 10 points under OV 9, because, in addition to the decedent, defendant created a risk of physical injury to the decedent's passenger, the driver of the car that struck the decedent, and the passenger in that car, all in the course of the sentencing offense.

Affirmed.

WILDER, P.J. (*concurring*). I concur in the result reached by the majority, but decline to join the majority's comments concerning the use of dictionaries to interpret a statute, which fail to fully acknowledge the well-established rules concerning this subject. See *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 56 n 11; 746 NW2d 282 (2008).

ATTORNEY GENERAL v BLUE CROSS BLUE SHIELD OF MICHIGAN

Docket Nos. 290167 and 295750. Submitted October 5, 2010, at Lansing. Decided December 7, 2010, at 9:05 a.m.

The Attorney General brought an action in the Ingham Circuit Court against Blue Cross Blue Shield of Michigan (BCBSM), challenging the legality of certain financial conduct by BCBSM under the Nonprofit Health Care Corporation Reform Act, MCL 550.1101 *et seq*. The challenges concerned a series of financial transactions undertaken by the Accident Fund Insurance Company of America, a wholly owned, for-profit Michigan stock insurance subsidiary of BCBSM, in acquiring three for-profit foreign insurance companies, and the transfer by BCBSM to the Accident Fund of $125 million, as a capital contribution with no repayment obligation. BCBSM moved for summary disposition, arguing that the provisions of MCL 550.1207(1)(o) regarding the acquisition of certain types of foreign insurers by a health-care corporation applied only to BCBSM, a health-care corporation under the act, but not to the Accident Fund, which is not a health-care corporation under the act. BCBSM also argued that it did not violate the act by making the capital contribution to the Accident Fund. Alternatively, BCBSM moved to refer the question of the legality of the capital contribution to the Commissioner of the Office of Financial and Insurance Regulation (OFIR) for resolution pursuant to the doctrine of primary jurisdiction. The court, Paula J. M. Manderfield, J., granted summary disposition in favor of BCBSM with regard to the count alleging that the Accident Fund's acquisition of the foreign insurers violated MCL 550.1207(1)(o), concluding that the restrictions set forth in the statute did not directly apply to transactions undertaken by the Accident Fund, nor did they apply to actions taken by BCBSM indirectly by and through the Accident Fund, its subsidiary. The court also dismissed without prejudice the count concerning the $125 million capital contribution and referred that matter to the OFIR Commissioner under the doctrine of primary jurisdiction. Plaintiff appealed (Docket No. 290167). The OFIR Commissioner then held that the capital contribution by BCBSM to the Accident Fund did not violate the

act. The Attorney General filed a second complaint in the circuit court against BCBSM and a petition to review the OFIR Commissioner's order, naming the OFIR and the OFIR Commissioner as respondents. The court, Paula J. M. Manderfield, J., granted summary disposition in favor of BCBSM and the respondents' motion to dismiss, concluding that it lacked jurisdiction to hear the case as an original action and that the petition for review had not been timely filed. Plaintiff appealed (Docket No. 295750). The appeals were consolidated.

The Court of Appeals *held*:

The trial court correctly determined that MCL 550.1207 did not preclude the Accident Fund from acquiring the foreign insurance companies. The trial court's grant of summary disposition with regard to that issue must be affirmed. The trial court erred by deferring to the OFIR Commissioner's interpretation of the act with regard to the legality of the capital contribution. Therefore, the dismissal of the count concerning that issue must be reversed, and the matter must be remanded to the trial court for a hearing de novo to determine whether the capital contribution violated the act. The appeal in Docket No. 295750 must be dismissed as moot.

1. The trial court's dismissal of the count of the original complaint regarding the capital contribution in the manner and under the circumstances presented in this matter constituted a final "disposition" of that claim for purposes of MCR 7.202(6)(a)(i).

2. The trial court correctly concluded that MCL 550.1207(1)(o) did not apply to the acquisition of the foreign insurers by the Accident Fund, BCBSM's wholly owned subsidiary. Nothing in the statute expressly prohibits any particular activity undertaken by a health-care corporation's subsidiary. The transactions about which plaintiff complains were not undertaken by BCBSM, they were undertaken by the Accident Fund, to which the restrictions of the statute are inapplicable. BCBSM did not itself invest in, purchase, take, receive, subscribe for, acquire, own, hold, vote, or employ any interest in the foreign insurance companies purchased by the Accident Fund. Thus, BCBSM did not "otherwise" engage in any such activity in violation of the statute.

3. The trial court correctly reasoned that reading MCL 550.1207(1)(o) as implicitly preventing the acquisition of workers' compensation insurers by the Accident Fund would be contrary to the language of MCL 550.1207(1)(x)(*i*), which explicitly permits such acquisitions.

4. The doctrine of primary jurisdiction permitted the trial court to refer the capital contribution issue to the OFIR Commis-

sioner for an advisory opinion, but the trial court erred by failing to retain jurisdiction regarding the issue and by failing to make a determination de novo with regard to the statutory-interpretation issue.

5. An agency's interpretation of a statute is not binding on the courts, and cannot be used to overcome the plain meaning of the statute. It is the courts, not the OFIR, that have the ultimate authority over the interpretation of the act, therefore, any statutory interpretation rendered by the OFIR Commissioner in this case was not binding on the trial court. The trial court erred when it failed to make an independent interpretation of the statute at issue with regard to the capital contribution issue.

Affirmed in part, reversed in part, and remanded.

BANDSTRA, J., concurring in part and dissenting in part, disagreed with the decision to remand to the trial court the issue regarding the capital contribution to allow the parties an opportunity to present evidence and fully brief the issue. The issue has been fully briefed, and no set of facts would justify the contribution under the clear language of MCL 550.1207(1)(x). By its plain language, MCL 550.1207(1)(x)(*vi*) prohibits BCBSM funds from being used to operate or subsidize in any way the Accident Fund. BCBSM is prohibited from using its funds to aid the Accident Fund with a grant or contribution of money, in any manner or fashion. The $125 million nonrepayable contribution of BCBSM funds to the Accident Fund meets this definition. The statute prohibits BCBSM from contributing its funds to the Accident Fund for any purpose, not merely for the purpose of subsidizing the Accident Fund's insurance rates. The "other financial transactions" permitted by the statute are of the type that have direct, immediate, and concrete mutual economic/financial benefit. A transfer of $125 million from BCBSM to the Accident Fund, without any repayment obligation or direct benefit to BCBSM, regardless of the purpose, does not meet this criteria. Judge BANDSTRA would conclude, without remanding the matter, that the $125 million contribution was impermissible under MCL 550.1207(1)(x).

1. CORPORATIONS — HEALTH-CARE CORPORATIONS — NONPROFIT HEALTH CARE CORPORATION REFORM ACT — SUBSIDIARIES OF HEALTH-CARE CORPORATIONS.

The restrictions on permissible activities by a health-care corporation in MCL 550.1207(1)(o) do not expressly prohibit any particular activity undertaken by a health-care corporation's subsidiary that is not a health-care corporation.

2. COURTS — ADMINISTRATIVE LAW — DOCTRINE OF PRIMARY JURISDICTION.

The doctrine of primary jurisdiction is applicable where the issues presented are of a type that an administrative agency possesses superior knowledge and expertise over the courts and that involve a regulatory area unfamiliar to the courts; referral to an agency is appropriate for preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to thereafter be decided by the courts; it is the courts, not administrative agencies, that have ultimate authority over statutory interpretation and any statutory interpretation rendered by an administrative agency is not binding on the courts.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Robert Ianni* and *Michael E. Moody*, Assistant Attorneys General, for the Attorney General in Docket No. 290167.

Michael A. Cox, Attorney General, and *Robert Ianni* and *Michael E. Moody*, Assistant Attorneys General, for the Attorney General in Docket No. 295750.

B. Eric Restuccia, Solicitor General, and *Michael P. Farrell*, Assistant Attorney General, for the Office of Financial and Insurance Regulation and the Commissioner of the Office of Financial and Insurance Regulation in Docket No. 295750.

Dickinson Wright PLLC (by *Joseph A. Fink*, *Jeffery V. Stuckey*, and *Scott R. Knapp*), for Blue Cross Blue Shield of Michigan.

Amicus Curiae:

Dykema Gossett PLLC (by *Lori McAllister*, *Sandra M. Cotter*, and *Shaun M. Johnson*) for the Coalition for a Fair & Competitive Insurance Market.

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

O'CONNELL, P.J. In these consolidated appeals, plaintiff/petitioner (hereafter plaintiff) appeals as of right the trial court's orders granting motions for summary disposition filed by defendant Blue Cross Blue Shield of Michigan (BCBSM) in actions in which plaintiff challenged the legality of certain financial conduct by BCBSM under the Nonprofit Health Care Corporation Reform Act, MCL 550.1101 *et seq*. (the Act). The appeals present two significant issues: (1) whether BCBSM violated § 207 of the Act, MCL 550.1207, when its subsidiary, the Accident Fund Insurance Company of America (the Accident Fund), purchased three for-profit insurance companies; and (2) whether Michigan's courts defer to the decisions of Michigan's administrative agencies concerning the interpretation of Michigan statutes.

Regarding the first issue, the trial court correctly determined that § 207 of the Act did not preclude the Accident Fund from acquiring the three insurance companies. Accordingly, in Docket No. 290167, we affirm the trial court's grant of summary disposition on count I. Regarding the second issue, the trial court erred by deferring to an administrative agency's interpretation of the Act. Accordingly, we reverse the trial court's dismissal of count II in Docket No. 290167, and remand to the trial court for a hearing de novo to determine whether BCBSM's $125 million contribution to the Accident Fund violated the Act. In addition, we dismiss the appeal in Docket No. 295750 as moot.

BACKGROUND FACTS

As our Supreme Court has explained:

> BCBSM is a unique creation. It is a non-profit, tax-exempt "charitable and benevolent institution", incorporated pursuant to special enabling legislation enacted by

> the Michigan Legislature in 1939, for the purpose of providing a mechanism for broad health care protection to the people of the State of Michigan.
>
> * * *
>
> BCBSM is not an insurance company in the usual sense of the term. It is a statutory, non-profit corporation which is regulated within the limits of special enabling legislation by the Commissioner [of the Office of Financial and Insurance Regulation (OFIR)] "in order to protect the interests of subscribers". Although it does operate according to principles similar to those of insurance companies, "it is not carried on as an insurance business for profit * * *, but rather it provides a method for promoting the public health and welfare in assisting * * * persons to budget" health care costs.
>
> Although BCBSM is regulated by the [OFIR] Commissioner, it is not managed by the Commissioner. It has its own officers and a board of directors to which management of the corporation is statutorily entrusted. [*Blue Cross & Blue Shield of Mich v Ins Comm'r*, 403 Mich 399, 415-418; 270 NW2d 845 (1978) (citations omitted).]

As a statutorily created entity, both the extent of the power of the commissioner of the OFIR (the OFIR Commissioner) to regulate BCBSM and the extent of BCBSM's permissible activities are governed by statute, and specifically, by the Act. *Id.* at 424; MCL 550.1101 *et seq*.

In 1993, the Legislature amended the Act to permit BCBSM to purchase the state accident fund, a for-profit workers' compensation insurer. MCL 550.1207(1)(x). Thereafter, BCBSM formed the Accident Fund as a wholly owned, for-profit Michigan stock insurance subsidiary, and, in December 1994, the Accident Fund purchased the assets and acquired the liabilities of the state accident fund.

At issue here are a series of financial transactions undertaken by the Accident Fund to acquire three

foreign insurance companies, as well as a $125 million contribution to the Accident Fund by BCBSM. In December 2005, the Accident Fund acquired 100 percent of the outstanding common shares of workers' compensation insurer United Wisconsin Insurance Company (UWI). On August 4, 2007, BCBSM's board of directors approved the Accident Fund's forthcoming acquisition of CWI Holdings, Inc. (CWI), a Delaware insurance holding company that itself owns 100 percent of the shares of CompWest Insurance Company, a California property and casualty insurance company that provides workers' compensation insurance primarily in California, and it also approved a capital contribution from BCBSM to the Accident Fund "in an amount sufficient to insure [sic] the collective workers' compensation companies are able to maintain an 'A' insurance rating." Then, on August 31, 2007, the Accident Fund acquired 100 percent of the outstanding common shares of Third Coast Insurance Company (Third Coast), an inactive property and casualty insurance company located in Illinois. Finally, in November 2007, BCBSM transferred $125 million to the Accident Fund, as a capital contribution with no repayment obligation pursuant to the August 4, 2007, authorization of its board of directors, and the Accident Fund acquired 100 percent of the outstanding shares of CWI.

On July 2, 2008, plaintiff filed a three-count complaint against BCBSM, challenging the permissibility of the Accident Fund's acquisition of UWI, CWI, and Third Coast, as well as of BCBSM's November 2007 $125 million contribution to the Accident Fund. Only counts I and II are at issue before this Court.[1] In count I, plaintiff alleged that the Accident Fund's acquisition

[1] Count III, which alleged that BCBSM's $125 million contribution to the Accident Fund constituted a breach of the asset purchase agreement

of the three foreign insurers violated MCL 550.1207(1)(o), which provides, as follows:

> *A health care corporation*, subject to any limitation provided in this act, in any other statute of this state, or in its articles of incorporation, *may do any or all of the following*:
>
> * * *
>
> (o) Subject to chapter 9 of the insurance code of 1956, 1956 PA 218, MCL 500.901 to 500.947, *invest and reinvest its funds* and, for investment purposes only, *purchase, take, receive, subscribe for, or otherwise acquire*, own, hold, vote, employ, sell, lend, lease, exchange, transfer, or otherwise dispose of, mortgage, pledge, use, and otherwise deal in and with, bonds and other obligations, shares, or other *securities or interests issued by entities other than domestic, foreign, or alien insurers*, as defined in sections 106 and 110 of the insurance code of 1956, 1956 PA 218, MCL 500.106 and 500.110, whether engaged in a similar or different business, or governmental or other activity, including banking corporations or trust companies. However, *a health care corporation may purchase, take, receive, subscribe for, or otherwise acquire*, own, hold, vote, employ, sell, lend, lease, exchange, transfer, or otherwise dispose of bonds or other obligations, shares, or other *securities or interests issued by a domestic, foreign, or alien insurer, so long as the activity meets all of the following*:
>
> (*i*) Is determined by the attorney general to be lawful under section 202 [MCL 550.1202].
>
> (*ii*) Is approved in writing by the commissioner as being in the best interests of the health care corporation and its subscribers.
>
> (*iii*) For an activity that occurred before the effective date of the amendatory act that added subparagraph (*iv*), will not result in the health care corporation owning or

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between BCBSM and the state, was dismissed by the trial court, and plaintiff has not appealed that decision.

> controlling 10% or more of the voting securities of the insurer or will not otherwise result in the health care corporation having control of the insurer, either before or after the effective date of the amendatory act that added subparagraph (*iv*). As used in this subparagraph and subparagraph (*iv*), "control" means that term as defined in section 115 of the insurance code of 1956, 1956 PA 218, MCL 500.115.
>
> (*iv*) Subject to section 218 [MCL 550.1218] and beginning on the effective date of the amendatory act that added this subparagraph, will not result in the health care corporation owning or controlling part or all of the insurer unless the transaction satisfies chapter 13 of the insurance code of 1956, 1956 PA 218, MCL 500.1301 to 500.1379, and the insurer being acquired is only authorized to sell disability insurance as defined under section 606 of the insurance code of 1956, 1956 PA 218, MCL 500.606, or under a statute or regulation in the insurer's domiciliary jurisdiction that is substantially similar to section 606 of the insurance code of 1956, 1956 PA 218, MCL 500.606. [Emphasis added.]

Plaintiff alleged that the Accident Fund's acquisition of UWI, CWI, and Third Coast violated the general prohibition, in the first sentence of subdivision (o) of § 207(1), against the acquisition of any "domestic, foreign, or alien insurers . . . ." While the second sentence of subdivision (o) provides an exception to that prohibition in certain situations, plaintiff further argued that the Accident Fund's acquisitions at issue here did not fall within the exception language.[2] Plaintiff further alleged, in count II of plaintiff's initial complaint, that

[2] While contending that subdivision (o) in its entirety is inapplicable to the Accident Fund, BCBSM has not disputed plaintiff's assertion that the Accident Fund's purchase of UWI, CWI, and Third Coast would not fall within the exception language if the subdivision applied. Further, we note that BCBSM's purchase of the Accident Fund was specifically allowed by a statute that excepted that particular acquisition from the prohibition of MCL 550.1207(1)(o). MCL 550.1207(1)(x).

BCBSM's November 2007 contribution of $125 million to the Accident Fund violated the restriction set forth in MCL 550.1207(1)(x)(*vi*), which prevents BCBSM from using its funds to "operate or subsidize in any way" the Accident Fund.[3]

BCBSM moved in the trial court for summary disposition of the complaint pursuant to MCR 2.116(C)(8), asserting that MCL 550.1207(1)(o) applies only to BCBSM, because it is "a health care corporation" under the Act, and that the statute does not apply to the Accident Fund, because it is not such a health-care corporation.[4] Further, BCBSM argued that it did not violate the Act by virtue of its capital contribution to the Accident Fund. Alternatively, BCBSM moved in the trial court to dismiss count II and refer it to the OFIR Commissioner for resolution pursuant to the doctrine of primary jurisdiction.

The trial court initially denied BCBSM's motion regarding count I. On count II, the trial court concluded that plaintiff had alleged sufficient facts to state a claim that BCBSM violated the statute by making the $125

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[3] The statute provides that a health-care corporation, notwithstanding the provisions of subdivision (o), may establish, own, and operate a domestic stock insurance company only for the purpose of acquiring, owning, and operating the state accident fund, as long as

> [h]ealth care corporation and subscriber funds are not used to operate or subsidize in any way the insurer including the use of such funds to subsidize contracts for goods and services. This subparagraph does not prohibit joint undertakings between the health care corporation and the insurer to take advantage of economies of scale or arm's-length loans or other financial transactions between the health care corporation and the insurer. [MCL 550.1207(1)(x)(*vi*).]

[4] The parties do not contest the fact that BCBSM is a health-care corporation under the Act and that the Accident Fund is not itself a health-care corporation under the Act. As discussed below, however, they are at odds about the legal implications of these facts.

million contribution to the Accident Fund at the time and in the manner that it did so, but the trial court dismissed that count without prejudice and referred it to the OFIR Commissioner under the doctrine of primary jurisdiction. BCBSM moved for reconsideration of the trial court's denial of its motion for summary disposition of count I of the complaint, and the trial court granted that motion and, on reconsideration, dismissed count I of plaintiff's complaint. On January 13, 2009, the trial court entered an order concluding that the restrictions set forth in MCL 550.1207(1)(o) do not directly apply to transactions undertaken by the Accident Fund, nor do they apply to actions taken by BCBSM indirectly by and through the Accident Fund, its subsidiary.

After plaintiff's appeal of the trial court's January 13, 2009, order was filed in this Court, the OFIR Commissioner considered the issues raised by count II of the complaint and entered his order, concluding that "BCBSM did not violate Section 207(1)(x)(*vi*) in its November 2007 capital contribution to the Accident Fund." Plaintiff then filed a second complaint in the circuit court against BCBSM and a petition to review the OFIR Commissioner's order, naming the OFIR and the OFIR Commissioner as respondents, asking the court to declare that the OFIR Commissioner's resolution of the challenge to BCBSM's capital contribution was contrary to the court's prior interpretation of the statute, that it was "contrary to [the scope of the trial court's] referral [to the OFIR Commissioner] for factual determinations," that it was not authorized by law and was contrary to the plain language of MCL 550.1207(1)(x)(*vi*), and that it was not supported by any record or competent evidence. Respondents moved for summary disposition, asserting that the claim that BCBSM's capital contribution violated MCL

550.1207(1)(x)(*vi*) was within the primary jurisdiction of the OFIR, that the OFIR Commissioner had adjudicated that claim in BCBSM's favor, and that plaintiff's petition that the trial court review the OFIR Commissioner's decision was untimely. BCBSM also moved for dismissal pursuant to MCR 2.116(C)(4), asserting that the trial court lacked subject-matter jurisdiction because plaintiff failed to seek judicial review of the OFIR Commissioner's decision within 21 days of the entering of that order. The trial court granted both BCBSM's motion for summary disposition and respondents' motion to dismiss, concluding that it lacked jurisdiction to hear the case as an original action and that the petition for review of the OFIR Commissioner's decision was not timely filed.

THE ACCIDENT FUND'S ACQUISITION OF THE INSURERS

Plaintiff first argues, in Docket No. 290167, that the trial court erred by granting summary disposition of count I of plaintiff's initial complaint because, contrary to the trial court's conclusion, MCL 550.1207(1)(o) prohibited the Accident Fund's acquisition of UWI, CWI, and Third Coast. We disagree.

As a preliminary matter, BCBSM asserts that this Court lacks jurisdiction to hear plaintiff's appeal as of right in Docket No. 290167 of the trial court's January 13, 2009, order, because the trial court's October 6, 2008, order granting in part and denying in part BCBSM's motion for summary disposition dismissed count II of plaintiff's complaint *without prejudice* and referred that count to the OFIR Commissioner. BCBSM argues that a dismissal without prejudice is not a final order under MCR 7.203(A), and therefore, that the trial court's disposition of count II in that manner "renders the collective orders from which this appeal is taken

non-final, and deprives this Court of jurisdiction to entertain the appeal of right." We disagree.

The trial court's dismissal of count II of the complaint in the manner and under the circumstances present here, constituted a final "disposition" of that claim for purposes of MCR 7.202(6)(a)(i). *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007). In *Rooyakker*, this Court rejected the argument that an order of summary disposition that referred certain claims to arbitration did not constitute a final order, concluding that the order of summary disposition in that case was a final order "because there was nothing left for the trial court to decide and it did not state that it was retaining jurisdiction . . . ." *Id*. at 148 n 1. Likewise, in the present case, there was nothing left for the trial court to decide regarding count II after its decision to refer the claim to the OFIR Commissioner, and the trial court did not state in the October 6, 2008, order dismissing that count without prejudice that it was retaining jurisdiction of that count. Instead, the trial court specifically indicated in its January 13, 2009, order granting summary disposition with regard to count I upon reconsideration that "[t]his decision resolved the last pending claim and closes this case." Thus, plainly, the trial court believed that there was nothing left for it to resolve and that it had "disposed" of all plaintiff's claims by its summary disposition of count I. Therefore, here as in *Rooyakker*, there was nothing left for the trial court to decide, and all claims were finally "disposed" of within the meaning of MCR 7.202(6)(a)(i).

Turning to the substantive issue presented, we first observe that this Court reviews de novo both a trial court's decision on a motion for summary disposition and questions of statutory interpretation. *City of Taylor*

v Detroit Edison Co, 475 Mich 109, 115; 715 NW2d 28 (2006); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). As this Court explained in *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998):

> A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true. [Citations omitted.]

The trial court determined that plaintiff failed to state a claim on which relief could be granted pursuant to MCL 550.1207(1)(o), because that section is inapplicable to the Accident Fund's acquisition, ownership, and operation of UWI, CWI, and Third Coast. As previously noted, MCL 550.1207(1)(o) provides, in pertinent part:

> A health care corporation, subject to any limitation provided in this act, in any other statute of this state, or in its articles of incorporation, may do any or all of the following:
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> * * *
>
> (o) Subject to chapter 9 of the insurance code of 1956 . . . invest and reinvest its funds and, for investment purposes only, purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, employ, sell, lend, lease, exchange, transfer, or otherwise dispose of, mortgage, pledge, use, and otherwise deal in and with, bonds and other obligations, shares, or other securities or interests issued by entities other than domestic, foreign, or alien insurers, as defined in sections 106 and 110 of the insurance code of 1956 . . .

> whether engaged in a similar or different business, or governmental or other activity, including banking corporations or trust companies.

This Court's goal when interpreting a statute is to discern and give effect to the Legislature's intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The intent of the Legislature is most reliably shown through the words used in the statute. *Id.* If the language in the statute is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and the statute must be enforced as written. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). In such cases, judicial construction is neither required nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Effect should be given to every phrase, clause, and word in the statute, and this Court will avoid a construction that would render any part of a statute surplusage or nugatory. *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). And, this Court "must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005). This Court may " 'consult dictionary definitions of terms that are not defined in a statute.' " *Woodard v Custer*, 476 Mich 545, 561; 719 NW2d 842 (2006), quoting *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). However, "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood

according to such peculiar and appropriate meaning." MCL 8.3a; *Woodard*, 476 Mich at 561.

There is no dispute that BCBSM, as a "health care corporation," was plainly prohibited by MCL 550.1207(1)(o) from directly acquiring UWI, CWI, and Third Coast. And, there is no allegation that it did so. The question presented is whether MCL 550.1207(1)(o) has any application to the acquisition of these insurers by BCBSM's wholly owned subsidiary, the Accident Fund. We agree with the trial court's conclusion that it does not.

By its plain language, MCL 550.1207(1) sets forth permissible activities by a "health care corporation," that is, a "nonprofit hospital service corporation, medical care corporation, or a consolidated hospital service and medical care corporation incorporated or reincorporated under" the Act. MCL 550.1105(2); MCL 550.1207(1). This includes BCBSM; it does not include the Accident Fund. Therefore, MCL 550.1207(1)(o) has no direct application to the Accident Fund's business activities. It applies here, then, only if it prevents BCBSM from activity undertaken by its wholly owned subsidiary. However, nothing in MCL 550.1207(1)(o) expressly prohibits any particular activity undertaken by a health-care corporation's subsidiary. The restrictions set forth in MCL 550.1207(1)(o) plainly apply only to a "health care corporation"; they do not mention or refer to such a corporation's affiliates or subsidiaries.

Plaintiff argues that the prohibition against the Accident Fund's acquisition of UWI, CWI, and Third Coast arises from the statute's prohibition against BCBSM "otherwise" acquiring, owning, or holding voting shares or voting securities or interests issued by a domestic, foreign, or alien insurer. That is, plaintiff argues that the acquisition of UWI, CWI, and Third

Coast by the Accident Fund constituted BCBSM "otherwise" acquiring those insurers within the meaning of MCL 550.1207(1)(o). Plaintiff points to language in MCL 550.1207(1)(o)(*iii*) and (iv), prohibiting a health-care corporation from direct or indirect control of certain types of insurers, as supporting plaintiff's assertion. Again, however, we find dispositive the fact that there is simply nothing in the plain language of the statute to support a conclusion that MCL 550.1207(1)(o) prohibits activities undertaken by the Accident Fund. The entirety of MCL 550.1207(1)(o) applies only to "health care corporations," and it permits BCBSM to acquire certain types of foreign insurers under certain circumstances. Thus, MCL 550.1207(1)(o) only applies when BCBSM undertakes a financial transaction meeting certain criteria. However, the transactions about which plaintiff complains were not undertaken by BCBSM; they were undertaken by the Accident Fund, to which the restrictions of MCL 550.1207(1)(o) are inapplicable. With respect to plaintiff's reliance on the "otherwise" language of the statute, BCBSM did not itself "invest [in] . . . purchase, take, receive, subscribe for, . . . acquire, own, hold, vote, [or] employ" any interest whatsoever in the three insurance companies purchased by the Accident Fund in any manner whatsoever. Thus, it did not itself "otherwise" engage in any such activity in violation of the statute.

Of further note in analyzing plaintiff's argument that MCL 550.1207(1)(o)(*iii*) and (*iv*) prohibit BCBSM from indirectly controlling UWI, CWI, and Third Coast by virtue of the acquisition of those companies by the Accident Fund, is the 2003 amendment of this section. Before that amendment, MCL 550.1207(1)(o) read as follows:

A health care corporation, subject to any limitation provided in this act, in any other statute of this state, or in its articles of incorporation, may do any or all of the following:

* * *

(o) Invest and reinvest its funds and, for investment purposes only, purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, employ, sell, lend, lease, exchange, transfer, or otherwise dispose of, mortgage, pledge, use, and otherwise deal in and with, bonds and other obligations, shares, or other securities or interests issued by entities other than domestic, foreign, or alien insurers, as defined in sections 106 and 110 of the insurance code of 1956 . . . whether engaged in a similar or different business, or governmental or other activity, including banking corporations or trust companies. However, a health care corporation may purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, employ, sell, lend, lease, exchange, transfer, or otherwise dispose of bonds or other obligations, shares, or other securities or interests issued by a domestic, foreign, or alien insurer, so long as the activity meets all of the following:

(*i*) Is determined by the attorney general to be lawful under section 202.

(*ii*) Is approved in writing by the commissioner as being in the best interests of the health care corporation and its subscribers.

(*iii*) Will not result in the health care corporation owning or controlling 10% or more of the voting securities of the insurer. *Nothing in this subdivision shall be interpreted as expanding the lawful purposes of a health care corporation under this act. Except where expressly authorized by statute, a health care corporation shall not indirectly engage in any investment activity that it may not engage in directly.* A health care corporation shall not guarantee or become surety upon a bond or other undertaking securing the deposit of public money. [Emphasis added.]

Effective July 23, 2003, however, subparagraph (*iii*) was rewritten, and a new subparagraph (*iv*) was added. As quoted earlier in this opinion, the amended subparagraph (*iii*) and the new subparagraph (*iv*) read as follows:

> (*iii*) For an activity that occurred before the effective date of the amendatory act that added subparagraph (*iv*), will not result in the health care corporation owning or controlling 10% or more of the voting securities of the insurer or will not otherwise result in the health care corporation having control of the insurer, either before or after the effective date of the amendatory act that added subparagraph (*iv*). As used in this subparagraph and subparagraph (*iv*), "control" means that term as defined in section 115 of the insurance code of 1956, 1956 PA 218, MCL 500.115.
>
> (*iv*) Subject to section 218 [MCL 550.1218] and beginning on the effective date of the amendatory act that added this subparagraph, will not result in the health care corporation owning or controlling part or all of the insurer unless the transaction satisfies chapter 13 of the insurance code of 1956, 1956 PA 218, MCL 500.1301 to 500.1379, and the insurer being acquired is only authorized to sell disability insurance as defined under section 606 of the insurance code of 1956, 1956 PA 218, MCL 500.606, or under a statute or regulation in the insurer's domiciliary jurisdiction that is substantially similar to section 606 of the insurance code of 1956, 1956 PA 218, MCL 500.606.

Thus, the prohibition against "a health care corporation . . . indirectly engag[ing] in any investment activity that it may not engage in directly" was removed by the Legislature. It was replaced with a prohibition against an investment by a health-care corporation that would result in the corporation owning 10 percent or more of the voting securities of a particular insurer or "otherwise result[ing] in the health care corporation having [the prohibited level of] control

of" that insurer. As amended, then, MCL 550.1207(1)(o)(*iii*) is violated only when the health-care corporation undertakes a financial transaction that results in it having control of the acquired insurer. Plainly, BCBSM did not itself acquire any interest in or control of the three insurers at issue. Thus, the conditions attendant to any such acquisition, set forth in subparagraphs (i)-(*iv*), were not implicated.

Further, as the trial court noted, MCL 550.1207(1)(x) provides, in relevant part, that BCBSM may

> establish, own, and operate a domestic stock insurance company [the Accident Fund] only for the purpose of acquiring, owning, and operating the state accident fund pursuant to chapter 51 of the insurance code of 1956 . . . so long as all of the following are met:
>
> (*i*) For insurance products and services the insurer *whether directly or indirectly* only transacts worker's compensation insurance and employer's liability insurance, transacts disability insurance limited to replacement of loss of earnings, and acts as an administrative services organization for an approved self-insured worker's compensation plan or a disability insurance plan limited to replacement of loss of earnings and does not transact any other type of insurance notwithstanding the authorization in chapter 51 of the insurance code of 1956 . . . This subparagraph does not preclude the insurer from providing either *directly or indirectly* noninsurance products and services as otherwise provided by law. [Emphasis added.]

Thus, the Act specifically authorizes the Accident Fund to indirectly transact certain types of insurance, including workers' compensation insurance, and to indirectly provide noninsurance products and services as permitted by law. We concur with the trial court's reasoning that reading MCL 550.1207(1)(o) as implicitly preventing the acquisition of workers' compensation insurers

by the Accident Fund would be contrary to the language of MCL 550.1207(1)(x)(*i*), which explicitly permits such acquisitions.[5]

THE DOCTRINE OF PRIMARY JURISDICTION

Plaintiff next argues that the trial court erred by dismissing count II of plaintiff's initial complaint and by referring the count to the OFIR Commissioner for a determination of whether BCBSM had violated the Act. We agree. The doctrine of primary jurisdiction permitted the trial court to refer the count to the OFIR Commissioner for an *advisory* opinion, but the trial court erred by failing to retain jurisdiction of the count and by failing to make a determination de novo of the statutory-interpretation issue.

In a convoluted argument, BCBSM argues that the doctrine of primary jurisdiction allows an administrative agency to issue a binding interpretation of a statute. This argument miscomprehends the doctrine. The applicability of the doctrine of primary jurisdiction presents a question of law, which this Court reviews de novo. *Psychosocial Serv Assoc, PC v State Farm Mut Auto Ins Co*, 279 Mich App 334, 336; 761 NW2d 716 (2008); *Mich Basic Prop Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 528; 618 NW2d 32 (2000). "The doctrine of primary jurisdiction is grounded in the principle of separation of powers. . . . [And it] is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 196-197; 631 NW2d 733 (2001) (quotation marks and citations omitted). As our

[5] Plaintiff does not allege that the three insurers acquired by the Accident Fund are engaged in providing insurance other than workers' compensation insurance in contravention of MCL 550.1207(1)(x)(*i*).

Supreme Court explained in *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 70-72; 559 NW2d 647 (1997):

> Primary jurisdiction "is a concept of judicial deference and discretion." LeDuc, Michigan Administrative Law, § 10:43, p 70. The doctrine exists as a "recognition of the need for orderly and sensible coordination of the work of agencies and of courts." *White Lake Improvement Ass'n v City of Whitehall*, 22 Mich App 262, 282; 177 NW2d 473 (1970). In *White Lake*, the Court of Appeals correctly noted that "[t]he doctrine of primary jurisdiction does not preclude civil litigation; it merely suspends court action." *Id.* at 271. Thus, LeDuc notes, "[p]rimary jurisdiction is not a matter of whether there will be judicial involvement in resolving issues, but rather of when it will occur and where the process will start." *Id.* at § 10:44, p 73. A court of general jurisdiction considers the doctrine of primary jurisdiction "whenever there is concurrent original subject matter jurisdiction regarding a disputed issue in both a court and an administrative agency." *Id.* at § 10:43, p 70.
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> In *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 613; 327 NW2d 805 (1982), we applied the United States Supreme Court's definition of the doctrine from *United States v Western P R Co*, 352 US 59; 77 S Ct 161; 1 L Ed 2d 126 (1956):
>
> " ' "Primary jurisdiction" . . . applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim *requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body*.' "
>
> The Court observed, "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.* at 64.

> Professors Davis and Pierce identify three major purposes that usually govern the analysis when a court is deciding whether to defer to an administrative agency under this doctrine. First, a court should consider "*the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue* . . . ." Second, it should consider "the need for uniform resolution of the issue . . . ." Third, it should consider "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities." Davis & Pierce, 2 Administrative Law (3d ed), § 14.1, p 272. Where applicable, courts of general jurisdiction weigh these considerations and defer to administrative agencies where the case *is more appropriately decided* before the administrative body. [Emphasis added.]

As our Supreme Court has observed in *Travelers Ins Co*, the doctrine of primary jurisdiction

> "reflects the courts' recognition that administrative agencies, created by the Legislature, are intended to be repositories of special competence and expertise uniquely equipped to examine the facts and develop public policy within a particular field." Thus, whether judicial review will be postponed in favor of the primary jurisdiction of an administrative agency "necessarily depends upon the agency rule at issue and the nature of the declaration being sought in the particular case."
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> * * *
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> Several reasons have been advanced for invocation of the primary jurisdiction doctrine. First, the doctrine underscores the notion that administrative agencies *possess specialized and expert knowledge to address issues of a regulatory nature. Use of an agency's expertise is necessary in regulatory matters in which judges and juries have little familiarity*. . . . A second consideration relates to respect for the separation of powers and the statutory purpose underlying the creation of the administrative agency, the powers granted to it by the legislature, and the powers

> withheld. This justification includes the principle that courts are not to make adverse decisions that threaten the regulatory authority and integrity of the agency. Third, the doctrine exists to promote consistent application in resolving controversies of administrative law. By application of the doctrine,
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> "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, *by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure*."
>
> In [*Attorney General v*] *Diamond Mtg Co* [414 Mich 603, 612-613; 327 NW2d 805 (1982)], this Court explained its adoption of these justifications for primary jurisdiction.
>
> "*In cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion*, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined."
>
> Thus, this Court recognized application of the primary jurisdiction doctrine to all cases in which it was deemed that *an administrative agency possessed superior knowledge and expertise in addressing recurring issues within the scope of their authority.* [*Travelers Ins Co*, 465 Mich at 198-200 (emphasis added; citations omitted).]

The doctrine of primary jurisdiction is applicable where the issues presented are of a type that an administrative agency possesses superior knowledge and expertise over the courts and that involve a regulatory area unfamiliar to the courts. Consequently, referral to an agency is appropriate for " '*preliminary* resort for ascertaining and interpreting the circum-

stances underlying legal issues,' " to thereafter be decided by the courts. *Id.* at 199 (emphasis added; citation omitted).

As a threshold issue, before invoking the doctrine of primary jurisdiction, a court must find that the administrative agency to which referral is sought has concurrent original jurisdiction over the issues raised. Here, the trial court did not specifically determine that the OFIR had concurrent original jurisdiction over the question whether the $125 million capital contribution was an impermissible subsidy under MCL 550.1207(1)(x). Nonetheless, the implication of the trial court's referral is necessarily that the OFIR has such jurisdiction.

BCBSM acknowledges that "[r]esolution of the issues raised in Count II was and is dependent upon the proper construction of MCL 550.1207(1)(x)(*vi*)" and notes that in *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), our Supreme Court held that courts should give " 'respectful consideration' " to the construction of a statute by an administrative agency charged with administering the statute and should not overturn the agency's interpretation without " 'cogent reasons.' " BCBSM then concludes that, "[g]iven the Commissioner's extensive experience in regulating the insurance and health care industries, and financial transactions between affiliated entities, the trial court properly gave to the Commissioner the initial opportunity to interpret Section 207, and this Court, respectfully, should not disturb that decision." However, BCBSM overstates the degree of consideration that is appropriately afforded to the OFIR Commissioner's determination on a question of statutory interpretation.

At issue in *In re Complaint of Rovas*, was whether SBC Michigan (SBC) violated § 502(1)(a) of the Michigan Telecommunications Act, MCL 484.2502(1)(a), by sending customers an erroneous bill. The customers filed a complaint with the Public Service Commission (PSC), which agreed with the customers that the erroneous bill constituted a violation. This Court had reluctantly affirmed, despite "reservations," concluding that the agency's interpretation of the statute was "plausible." *In re Complaint of Rovas*, 482 Mich at 93-94. Our Supreme Court reversed. It first noted:

> This case implicates the powers, and the boundaries of the powers, of all three branches: the Legislature, the judiciary, and administrative agencies, which are part of the executive branch. Thus, separation of powers principles will aid in the analysis of the proper consideration due an administrative agency's interpretation of a statute.
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> The people of the state of Michigan have divided the powers of their government "into three branches: legislative, executive and judicial." Furthermore, "[n]o person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."
>
> "The legislative power of the State of Michigan is vested in a senate and a house of representatives." Simply put, legislative power is the power to make laws. In accordance with the constitution's separation of powers, this Court "cannot revise, amend, deconstruct, or ignore [the Legislature's] product and still be true to our responsibilities that give our branch only the judicial power." While administrative agencies have what have been described as "quasi-legislative" powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature.
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> Since the time of *Marbury v Madison* [5 US (1 Cranch) 137; 2 L Ed 60 (1803)], interpreting the law has been one of the defining aspects of judicial power. "Although we may not usurp the lawmaking function of the legislature, the

> proper construction of a statute is a judicial function, and we are required to discover the legislative intent." Administrative agencies exercise what have been described as "quasi-judicial" powers. However, such power is limited and is not an exercise of constitutional "judicial power." The primary "judicial" function exercised by administrative agencies is confined to conducting contested cases, like the one at issue here. These administrative contested cases resemble trials. Constitutionally and statutorily, these administrative fact-finding exercises are entitled to a degree of deference defined by statute and our constitution. However, fact-finding in an administrative contested case, much like in a trial before a circuit court, is a far different endeavor than construing a statute. [*Id*. at 97-99.]

With these principles in mind, the Court explained the standard of review afforded by the courts to an agency's interpretation of a statute as follows:

> [T]he Michigan Constitution specifically recognizes administrative agencies. Furthermore, the constitution explicitly provides for judicial review of administrative decisions . . . to determine: (1) that the decision is authorized by law, and (2) if a hearing is required, that the decision is supported by record evidence. However, the provision *does not stand for the proposition that agencies can assume this Court's constitutional role as the final arbiter of the meaning of a statute.*
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> * * *
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> . . . This Court has uniformly held that statutory interpretation is a question of law that this Court reviews de novo. Thus, concepts such as "abuse of discretion" or "clear error," which are similar to the standards of review applicable to other agency functions, simply do not apply to a court's review of an agency's construction of a statute.
>
> . . . While there are some opinions that seem to stand for the proposition that agency statutory interpretations are reviewed for "reasonableness" or an "abuse of discretion," those standards do not apply to the interpretation of a

> statute, and *they threaten the separation of powers principles discussed earlier by allowing the agency to usurp the judiciary's constitutional authority to construe the law* and infringe on the Legislature's lawmaking authority.
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> * * *
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> This Court announced the proper standard of review for agency statutory construction more than 70 years ago in *Boyer-Campbell v Fry* [271 Mich 282, 296-297; 260 NW 165 (1935)], which dealt with the proper construction of the General Sales Tax Act. The *Boyer-Campbell* Court held that
>
> "the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature."
>
> This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. *However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.* [*Id.* at 99-103 (emphasis added; citations and quotation marks omitted).]

In sum, then, contrary to BCBSM's assertion, " '[r]espectful consideration' is not equivalent to any normative understanding of 'deference' as the latter term is commonly used in appellate decisions," and " 'the agency's interpretation is not binding on this Court, and cannot be used to overcome the statute's plain mean-

ing.' " *Id*. at 105, 108 (citation omitted). It is the courts, not the OFIR, that have the ultimate authority over the statutory interpretation of the Act, and any statutory interpretation rendered by the OFIR Commissioner in this case is not binding on the court.

Therefore, the trial court erred when it failed to make an independent interpretation of the statute at issue in count II. Count II is remanded to the trial court; we direct the trial court to make an independent, de novo interpretation of the statute. The court must allow the parties an opportunity to present evidence and to fully brief the issue. The court may also invite and allow any appropriate entities to file amicus briefs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Given our reversal with regard to count II, plaintiff's appeal of the trial court's dismissal of plaintiff's second complaint, at issue in Docket No. 295750, is rendered moot. We do not retain jurisdiction. Neither party having prevailed in full, there shall be no taxable costs.

MARKEY, J., concurred.

BANDSTRA, J. (*concurring in part and dissenting in part*). I concur with most of the majority opinion but disagree with its conclusion that the trial court should decide on remand a question that was raised on appeal, whether the $125 million capital contribution by Blue Cross Blue Shield of Michigan (BCBSM) to the Accident Fund Insurance Company of America (the Accident Fund) violated MCL 550.1207(1)(x). The majority directed a remand on this issue to allow the parties an opportunity to present evidence and fully brief it. However, the issue has been fully briefed, and no set of facts would justify the capital contribution under the clear language of the statute.

MCL 550.1207(1)(x) provides, in relevant part:

> A health care corporation, subject to any limitation provided in this act, in any other statute of this state, or in its articles of incorporation, may do any or all of the following:
>
> * * *
>
> (x) [E]stablish, own, and operate a domestic stock insurance company only for the purpose of acquiring, owning, and operating the state accident fund pursuant to chapter 51 of the insurance code of 1956 . . . so long as all of the following are met:
>
> * * *
>
> (*vi*) Health care corporation and subscriber funds are *not used to operate or subsidize in any way* the insurer *including the use of such funds to subsidize contracts for goods and services*. This subparagraph does not prohibit joint undertakings between the health care corporation and the insurer to take advantage of economies of scale or arm's-length loans or other financial transactions between the health care corporation and the insurer. [Emphasis added.]

As the majority has noted, this Court's goal when interpreting a statute is to discern and give effect to the Legislature's intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The intent of the Legislature is most reliably shown through the words used in the statute. *Id.* If the language in the statute is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and the statute must be enforced as written. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). Effect should be given to every phrase, clause, and word in the statute, and this Court will avoid a construction that would render any part of a statute surplusage or nugatory. *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d

570 (2008). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). And, this Court "must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005). This Court may " 'consult dictionary definitions of terms that are not defined in a statute.' " *Woodard v Custer*, 476 Mich 545, 561; 719 NW2d 842 (2006), quoting *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). However, "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a; *Woodard*, 476 Mich at 561.

By its plain language, MCL 550.1207(1)(x)(*vi*) prohibits BCBSM funds from being used to "operate or subsidize in any way" the Accident Fund, "including the use of such funds to subsidize contracts for goods and services." *Random House Webster's College Dictionary* (1992), defines "any" as "one, a, an or some," or as "every, [or] all"; it defines "way" as "manner, mode, or fashion"; it defines "operate" as "to work, perform or function" or "to manage or use"; it defines "subsidize" as "to furnish or aid with a subsidy" and it defines "subsidy" as "any grant or contribution of money." Applying these definitions to § 207(1)(x)(*vi*) then, BCBSM is prohibited from using its funds to aid the Accident Fund with a grant or contribution of money, in any manner or fashion. Certainly, the $125 million nonrepayable contribution of BCBSM funds to the Accident Fund meets this definition.

BCBSM argues, and the commissioner of the Office of Financial and Insurance Regulation (OFIR) (the OFIR Commissioner) agreed, that the term "subsidize" as used in the statute refers only to "subsidization," an insurance industry term with a particular, technical meaning limited to *rate* subsidization and that it is only this particular activity that the Legislature intended to prohibit. See MCL 8.3a. However, even assuming "subsidization" might be interpreted that way, the statute does not merely prohibit "subsidization" and the restrictive connotation that BCBSM would have us impose is belied by the Legislature's use of the much broader "operate or subsidize in any way" phrase, as just explained.

Further, § 207(1)(x)(*vi*) states that BCBSM may not subsidize the Accident Fund by using BCBSM funds "to subsidize contracts for goods and services." Again, this is a broad phrase and there is no limiting language suggesting that the contracts that BCBSM cannot subsidize are only those contracts that would affect the Accident Fund's rates. Again, therefore, this broad statutory language is inconsistent with the reading of the statute that BCBSM urges on us; to accept BCBSM's argument would improperly render the broad statutory provision regarding "contracts for goods and services" surplusage or nugatory. *Herman*, 481 Mich at 366.

In sum, reading the prohibition against the use of BCBSM funds to subsidize in any way the Accident Fund, "in its grammatical context," *Sun Valley Foods*, 460 Mich at 237, and considering "both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme," *Williams*, 268 Mich App at 425, as this Court is required to do, the only conclusion that can be drawn from the plain language of

MCL 550.1207(1)(x)(*vi*) is that BCBSM is prevented from contributing its funds to the Accident Fund for any purpose, not merely for the purpose of subsidizing the Accident Fund's insurance rates.[1]

BCBSM further argues that the capital contribution constitutes a permissible "other financial transaction" within the meaning of § 207(1)(x)(*vi*). This argument also lacks merit. "Under the statutory construction doctrine known as ejusdem generis, where a general term follows a series of specific terms, the general term is interpreted 'to

[1] BCBSM asserts, and the OFIR Commissioner noted, that capital contributions between parent and subsidiary corporations are commonplace in the insurance industry. However, this has no bearing on the interpretation of the instant statutory provision, which regulates particularly *this* parent and *this* subsidiary in a very specific manner, considering the unique nature of BCBSM and its corresponding unique posture in the insurance market. Nor does the application of MCL 550.1207(1)(x)(*vi*) depend in any way on the motivation or purpose behind BCBSM's contribution to the Accident Fund. Rather, the statute prohibits BCBSM from aiding the Accident Fund financially in any manner or fashion.

BCBSM relies on the legislative history behind changes that were made to the Nonprofit Health Care Corporation Reform Act, MCL 550.1101 *et seq*., at the same time that the statute at issue was enacted. BCBSM cites old caselaw suggesting that legislative intent can appropriately be considered, *Girard v Wagenmaker*, 437 Mich 231, 238-239; 470 NW2d 372 (1991), but that caselaw has been seriously undermined by more recent authority stating that "in Michigan, a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001). In any event, as I have explained, the statute here is unambiguous and judicial construction of any sort, including through an analysis of legislative history, is neither required nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). That same rule applies to consideration of statutes or legislation that are *in pari materia*, a doctrine only to be utilized when "the statute under examination is itself ambiguous." *Tyler v Livonia Pub Sch*, 459 Mich 382, 392; 590 NW2d 560 (1999). For all these reasons, BCBSM's attempts to avoid the clear language of the statute, while creative, must fail.

include only things of the same kind, class, character, or nature as those specifically enumerated.' " *Neal*, 470 Mich at 669, quoting *Huggett v Dep't of Natural Resources*, 464 Mich 711, 718-719; 629 NW2d 915 (2001). Therefore, the language "other financial transactions" must be interpreted to include only those transactions of the same kind, class, character, or nature as "joint undertakings" to allow BCBSM and the Accident Fund to take advantage of economies of scale, or "arm's-length loans . . . ." MCL 550.1207(1)(x)(*vi*). Thus, the "other financial transactions" permitted by the statute are of the type that have direct, immediate, and concrete mutual economic/financial benefit. A transfer of $125 million from BCBSM to the Accident Fund, without any repayment obligation or direct benefit to BCBSM, regardless of the purpose, does not meet this criteria.

For these reasons, I would conclude, without remanding the issue, that BCBSM's $125 million contribution to the Accident Fund was impermissible under the plain language of MCL 550.1207(1)(x).

WATTS v MICHIGAN MULTI-KING, INC

Docket No. 293185. Submitted October 7, 2010, at Detroit. Decided December 14, 2010, at 9:00 a.m.

Nyla Watts filed suit in the Wayne Circuit Court against Michigan Multi-King, Inc, after she slipped and fell on a wet floor in defendant's Baja Fresh restaurant. The court, Daphne Means Curtis, J., granted defendant's motion for summary disposition on the theory that the wet condition of the floor was an open and obvious danger. Plaintiff appealed.

The Court of Appeals *held*:

A premises possessor has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land, but is not required to protect an invitee from an open and obvious danger unless special aspects of the condition make the risk unreasonably dangerous. A condition creates an open and obvious danger if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. A condition that is not visible to a reasonable and sighted person is not an open and obvious danger. The restaurant floor had been mopped shortly before plaintiff's fall. Although the incident report indicated that there were "wet floor" signs present, plaintiff testified that there were no signs present and that, both before and after her fall, the tile did not look shiny or wet, and nothing else about its appearance appeared out of the ordinary. Defendant presented no evidence to show the floor was visibly wet at the time of plaintiff's fall. Plaintiff produced evidence that the condition was not an open and obvious danger and so summary disposition was improperly granted.

Reversed and remanded.

WILDER, P.J., concurring in the result, agreed that defendant failed to present evidence to show that the allegedly wet floor was visibly wet.

NEGLIGENCE — PREMISES LIABILITY — INVITEES — OPEN AND OBVIOUS DANGERS.

A condition creates an open and obvious danger for which a premises possessor may be liable if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual

> inspection; a condition that is not visible to a reasonable and sighted person is not an open and obvious danger.

Eric H. Clark for plaintiff.

Feuer & Kozerski, P.C. (by *Scott L. Feuer*), for defendant.

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition on the basis of the open and obvious danger doctrine. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BACKGROUND

On February 27, 2008, at approximately 4:00 p.m., plaintiff was finishing a meal at defendant's restaurant in Northville, Michigan. There was no precipitation falling that day, but plaintiff stated that there may have been snow on the ground outside. Plaintiff was wearing boots with approximately 1½-inch wedge heels, and she wore corrective lenses.

After ordering her meal at the counter, plaintiff put her purse down at a table and went to get a drink before sitting down. Her friend went to the self-serve salsa bar, brought some salsa back to the table, and then retrieved both of their trays of food from the counter when their numbers were called. Once the two women finished eating, they got up from the table to throw away their trash. Plaintiff slipped and fell while walking with her tray from the table to the trash receptacle, landing on her left hip and side.

Plaintiff was helped up by one of the restaurant's employees. The employee said, "Sorry, we just mopped the floor." When plaintiff stood up, she noticed that her hand and clothes were damp, but did not notice any spills or color to the wetness. She testified that "[i]t looked like the tile that's on the floor" except for a smudge created by her own fall.

Plaintiff was then approached by another employee, who also apologized and explained that they had just mopped the floor. The employee explained that they try to mop when there are few customers in the restaurant. She gave plaintiff the manager's name and telephone number and told her that, as soon as the manager arrived, they would fill out an incident report. The employee also took plaintiff's name, address, and telephone number.

Plaintiff's friend drove her back to work. Her manager at work immediately drove her to Providence Park Hospital because her pain was getting worse. Plaintiff was diagnosed with hip contusions and a lumbar muscle strain. She was told to take Motrin for pain, but when it made her sick, she was prescribed Darvocet. Several days later, plaintiff met with her primary care physician, who gave her a shot of anti-inflammatory medication. Plaintiff also saw an orthopedic doctor and a physical medicine doctor.

At her deposition, plaintiff stated that she did observe the floor as she walked toward the waste receptacle and that she did not notice anything on, or unusual about, the floor before her fall. She had not seen any spills, caution signs, or anything else that would indicate the floor was anything other than normal. She did not see any employee of the restaurant mopping the floor before her fall. The restaurant was not busy; only a few patrons came and went during the

time that plaintiff and her friend were there and none of them sat down to eat. The incident report generated by the restaurant employees acknowledged that plaintiff had slipped on the wet floor. The report indicates that "wet floor" signs were on display at the time. However, as previously noted, plaintiff testified that no such signs were present.

Plaintiff filed a complaint alleging negligence against defendant in permitting an unreasonably dangerous condition to exist on the floor of the restaurant. On April 22, 2009, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's claim was barred by the open and obvious danger doctrine. Plaintiff responded that there was a genuine issue of material fact regarding whether the danger was open and obvious, as her deposition showed that she had not noticed the dampness on the floor until after she had fallen. At the June 26, 2009, hearing on defendant's motion for summary disposition, the trial court dismissed the case, stating:

> [T]his is just the kind of case that the Supreme Court in *Lugo* and *Bertrand* and *Sidorowicz* . . . discuss, and that is the situation where a reasonable prudent person on casual inspection should be aware of the danger. I don't like the law in that regard, especially the case I just talked about, but it is the law. The motion is granted.

Accordingly, on July 8, 2009, the court entered an order dismissing plaintiff's cause of action. Plaintiff now appeals.

II. ANALYSIS

Plaintiff argues that the trial court erred in granting defendant's summary disposition motion under MCR 2.116(C)(10) and dismissing her claim on the basis that the hazard that caused her fall and related injuries was

open and obvious. We review de novo a trial court's ruling on a motion for summary disposition. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A landowner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises possessor is not generally required to protect an invitee from open and obvious dangers, unless special aspects of a condition make even an open and obvious risk unreasonably dangerous, in which case the possessor must take reasonable steps to protect invitees from harm. *Id*. at 516-517.

The question of whether a condition presents an "open and obvious" danger depends on whether "it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *O'Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003). The test is objective; "the inquiry is whether a reasonable person in the plaintiff's position" would have done so. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). When deciding a summary disposition motion based on the open and obvious danger doctrine, "it is important for courts . . . to focus on the objective nature of the condi-

tion of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo*, 464 Mich at 523-524. If genuine issues of material fact exist regarding the condition of the premises and whether the hazard was open and obvious, summary disposition is inappropriate. See *Bragan v Symanzik*, 263 Mich App 324, 327-328; 687 NW2d 881 (2004).

In this case, the parties essentially agree that the floor had been mopped shortly before plaintiff's fall. Although the report from the store indicated that there were "wet floor" signs present, plaintiff testified that there were no signs present. Plaintiff testified that both before and after her fall, the tile did not look shiny or wet, and nothing else about its appearance appeared out of the ordinary.

Defendant has offered no testimony or other evidence to demonstrate that the floor was visibly, let alone obviously, wet at the time of plaintiff's fall or that a reasonable person would have observed that condition on casual observation. Instead, defendant has sought to broaden the open and obvious doctrine so as to render even non-visible hazards visible.

Defendant and the trial court appear to have misunderstood the decision in *Sidorowicz v Chicken Shack, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2003 (Docket No. 239627), upon which they rely. In *Sidorowicz*, the plaintiff was legally blind and, therefore, unable to see the water on the floor of the men's restroom on which he slipped and fell. *Id.* at 1. An employee testified that upon inspection of the bathroom she could see water on the floor. *Id.* at 2. Thus, the water on the bathroom floor was visible upon casual inspection. A panel of this Court held that, for application of the open and obvious doctrine, the plaintiff's blindness was irrelevant. The Michigan Su-

preme Court denied leave, 469 Mich 919 (2003), and Justice TAYLOR's concurrence essentially approved the Court of Appeals' analysis.[1]

Contrary to defendant's assertion, even if *Sidorowicz* had precedential authority,[2] it would not mandate dismissal in this case. Indeed, defendant and the trial court have turned the *Sidorowicz* holding on its head by concluding that conditions a reasonable and sighted person might *not* see may nevertheless be considered open and obvious. Defendant and the trial court both failed to recognize that the reason the water in *Sidorowicz* was found to be open and obvious was that, despite being unseen by a blind person, it remained discoverable on casual inspection to a sighted person. Defendant's contention that hazards which are not visible even to a reasonable and sighted person can still be open and obvious runs counter to the most fundamental principle of the doctrine, i.e., that the hazard be discoverable "upon casual inspection." *O'Donnell*, 259 Mich App at 575.

Furthermore, we reject defendant's assertion that a wet floor in a restaurant is a common everyday hazard of which customers are expected to be aware, making it *always* open and obvious regardless of its visibility. Defendant is essentially arguing that by simply entering a restaurant, patrons are on notice that the floor may have been mopped or a spill may be present making a slip and fall likely and requiring that they avoid stepping on a wet floor even if the floor is not

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[1] We do note that the Michigan Supreme Court has never yet granted leave "to explore how [its] explanation of the open and obvious doctrine in *Lugo* . . . relates to those with disabilities." *Sidorowicz*, 469 Mich at 920 (CAVANAGH, J., dissenting).

[2] *Sidorowicz* is an unpublished opinion and so is not precedentially binding. MCR 7.215(C)(1).

visibly wet. This is not consistent with the open and obvious doctrine, but instead rests upon a broadened version of the assumption of risk doctrine which, even in its narrower form, was abolished in Michigan 45 years ago, see *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 78; 597 NW2d 517 (1999) (Noting that *Felgner v Anderson*, 375 Mich 23; 133 NW2d 136 (1965), "abolished assumption of the risk in" ordinary negligence actions), and has no place in the "open and obvious" doctrine.

III. CONCLUSION

The entire premise of the open and obvious danger doctrine requires that the hazard would be "*obvious*" upon "*casual* inspection." *O'Donnell*, 259 Mich App at 575 (emphasis added). Plaintiff has introduced evidence that this was not the case here and so summary disposition was improperly granted. Accordingly, we reverse and remand for additional proceedings not inconsistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, is entitled to costs. MCR 7.219(A).

WILDER, P.J. (*concurring*). Because I agree with the majority that defendant failed to present evidence to show that the allegedly wet floor was *visibly* wet, such that it would have been reasonable to expect "an average person of ordinary intelligence" to discover the wet floor condition "upon casual inspection," *O'Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003), I concur in the result reached by the majority.

In re APPLICATION OF CONSUMERS ENERGY COMPANY FOR RATE INCREASE

Docket Nos. 286477 and 288728. Submitted October 6, 2010, at Lansing. Decided December 14, 2010, at 9:05 a.m.

Consumers Energy Company filed an application in the Public Service Commission (PSC) seeking the authority to increase the base rate charged its retail electric customers. The PSC approved a rate increase but denied Consumers' request to eliminate a mechanism for tracking tree-trimming and forestry expenses, which had been imposed to help ensure Consumers adequately fund its forestry program. The PSC approved Consumers' proposed electric choice incentive mechanism (ECIM), which was intended to smooth the effect of fluctuations in Consumers' retail open access sales, allowed Consumers to fund the low-income and energy efficiency fund (LIEEF) administered by the PSC, and authorized Consumers to finance two independent consultants retained by the PSC staff to investigate Consumers' application. The PSC also held that issues raised by intervenor Phil Forner had been fully decided in an earlier proceeding, and it declined to address them again. The Attorney General and Forner appealed separately and the appeals were consolidated.

The Court of Appeals *held*:

1. In the absence of specific statutory authorization, retroactive ratemaking in utility cases is prohibited. Past expenses and costs are not recoverable under a future rate. However, retroactive ratemaking involves a change either upward or downward in rates charged by a utility for its service under a lawful order and thus does not take place where a prospective rate takes into account a past expense. The PSC does not exceed the scope of its authority by permitting a utility to use deferred-cost accounting. There was no error in the authorization of the tree-trimming/forestry expense tracker and electric choice incentive mechanism. Those devices simply and properly enable Consumers to recover actual expenses incurred in a given year by accounting for them as subsequent years' expenses to be reflected in new rates with properly prospective effect.

2. Under the Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq*., the PSC is authorized to administer the

LIEEF, which was intended to provide shut-off and other protection for low-income customers and to promote energy efficiency by all customer classes. MCL 460.10d(7) delineates a source for funding the LIEEF, but does not restrict funding of the LIEEF to excess securitization savings. Moreover, the Legislature has indicated its intent for the continuation of the LIEEF through the provision of ongoing appropriations beyond the initial six-year period. *In re Application of Consumers Energy Co*, 279 Mich App 180, 190-191; 756 NW2d 253 (2008). The PSC properly resolved this issue in Consumers' favor.

3. The PSC may accept funding for consultants from a regulated party only where statutorily authorized. No statutory authority exists for the PSC's allowing a party before it to cover directly part of its normal operational expenses in this situation. That decision was therefore unlawful and created the appearance of impropriety. However, there was no suggestion that the procedure resulted in biased experts or a result more favorable to Consumers than otherwise would have ensued in this case, and therefore the error was harmless.

Affirmed.

1. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — RATEMAKING AUTHORITY.

In the absence of specific statutory authorization, retroactive ratemaking in utility cases is prohibited, and past expenses and costs are not recoverable under a future rate; however, retroactive ratemaking involves a change either upward or downward in rates charged by a utility for its service under a lawful order and thus does not take place where a prospective rate takes into account a past expense, such as when the Public Service Commission permits a utility to use deferred-cost accounting.

2. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — RATEMAKING AUTHORITY — LOW-INCOME AND ENERGY EFFICIENCY FUND — SOURCE OF FUNDING.

Under the Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq*., the Public Service Commission is authorized to administer the low-income and energy efficiency fund (LIEEF); MCL 460.10d(7) delineates a source for funding the LIEEF, but does not restrict funding of the LIEEF to excess securitization savings and permits the continuation of the LIEEF through the provision of ongoing appropriations beyond the initial six-year period.

3. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — STATUTORY AUTHORITY — OPERATIONAL EXPENSES — APPEARANCE OF IMPROPRIETY.

The Public Service Commission may accept funding for consultants from a regulated party only when statutorily authorized.

H. Richard Chambers, *Jon R. Robinson*, and *John C. Shea* for Consumers Energy Company.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Steven D. Hughey* and *Patricia S. Barone*, Assistant Attorneys General, for the Public Service Commission.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Michael E. Moody*, Assistant Attorney General, for the Attorney General.

Phil Forner *in propria persona*.

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

MARKEY, J. These consolidated cases arose from petitioner Consumers Energy Company's filing in March 2007 an application to raise its rates. In Docket No. 286477, appellant Attorney General appeals by right the June 10, 2008, order of the Public Service Commission (PSC) insofar as it (1) required Consumers to modify its customers' rates to reflect actual tree-trimming or forestry expenses; (2) allowed Consumers, through its electric choice incentive mechanism, to modify rates to even out the impact of fluctuations in retail open-access sales; (3) allowed Consumers to require its customers to continue supporting the low-income and energy efficiency fund, and (4) allowed Consumers to provide funding for two consultants to assist the PSC staff in connection with this case. In Docket No. 288728, appellant Phil Forner appeals that order insofar as it did not require Consumers to pay interest on its refunding of an improper subsidy, did not require that certain costs Consumers incurred in providing services to an appliance service program be

allocated to that program so that Consumers could lower its costs of providing electricity, and did not require that any related postage costs were among those so allocated.

For the reasons set forth below, we reject all but one of these claims of error: We agree with the objection that the PSC's having allowed Consumers to provide the funding for the experts was wrong but conclude that the error was harmless. Accordingly, we affirm the PSC's order in its entirety.

I. STANDARDS OF REVIEW

The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. See also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court gives due deference to the PSC's administrative expertise, and should not substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Application of Consumers Energy Co*, 279

Mich App 180, 188; 756 NW2d 253 (2008). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

II. RETROACTIVE RATEMAKING

The PSC summarized the issue relating to the tree-trimming/forestry expense tracker as follows:

> The Staff proposed forestry related costs totaling $41,535,669 for the 2008 test year, a figure that represents the actual 2006 expense level adjusted for inflation. The Staff also supported the continuation of the forestry expense tracker and refund mechanism approved [in an earlier case]. . . .
>
> The Attorney General . . . argued that the forestry tracker should be eliminated on grounds that the Commission lacks specific statutory authority to approve the type of retroactive ratemaking embodied by this tracker.
>
> The Staff, Dow/Hemlock, and ABATE responded that it would be irresponsible to eliminate the tracking mechanism at this point, when Consumers has not yet satisfactorily demonstrated that it will spend adequate amounts for tree-trimming and forestry. . . . The Staff argued that for several years Consumers did not show a willingness to spend adequately for its tree trimming and forestry management and contended that it is imperative to continue the tracking and refund mechanism for sufficient time to ensure that Consumers fully supports the program.
>
> The ALJ found that the Attorney General's argument was without merit and has been repeatedly rejected by the Commission. The ALJ agreed with the Staff, Dow/Hemlock, and ABATE that, despite the substantial increase in forestry expenditures in 2006, Consumers' system reliability has not improved. Thus, a long-term increase in forestry related efforts is required and, because

> funding can easily be shifted from forestry to other purposes, the tracker is appropriate. . . .
>
> The Commission agrees with the ALJ's reasoning and conclusions on this issue and finds that the forestry tracker should continue until Consumers adequately demonstrates that it has caught up with much neglected tree trimming. The Commission is generally cautious about requiring measures that include tracking or refund mechanisms. However, because Consumers' failure to adequately fund its forestry program for several years has compromised service reliability, quality, and safety, the Commission determines that it is prudent to continue the forestry tracker until the Commission's concerns are allayed.

The PSC summarized the issue relating to the electric choice incentive mechanism (ECIM) as follows:

> Consumers proposed an Electric Choice Incentive Mechanism (ECIM) designed to smooth the effect of fluctuations in its retail open access (ROA) sales. According to Consumers, if ROA sales increase or decrease more than 5% from the amount set in rates, a charge or credit would apply to rates of the class where the ROA sales change occurred. Consumers argues that because it is difficult to predict ROA sales, the ECIM would assist the company in its management. . . .
>
> The Staff supported the ECIM and argued that it would provide an incentive for Consumers to further reduce costs in the event of ROA sales changes.
>
> The Attorney General argued that the Commission lacks specific statutory authority to approve the ECIM, which the Attorney General claims violates the rule against retroactive ratemaking. In addition, the Attorney General, Dow/Hemlock, and ABATE claim that because ROA load is expected to be flat for the next few years, the ECIM is unnecessary. . . .
>
> The ALJ recommended that the Commission approve the ECIM observing that although ROA load fluctuation is expected to be flat for the next few years, in the past,

> annual variations in ROA load have ranged from -64% to +227%.
>
> The Commission agrees with the ALJ, the Staff, and Consumers that the ECIM is reasonable and should be approved.

The Attorney General argues that approval of the tree-trimming/forestry tracker and ECIM constitutes retroactive ratemaking. We disagree.

As an initial matter, we reject Consumers' challenge to the Attorney General's standing to challenge the propriety of the tree-trimming/forestry tracker. Consumers states that it no longer objects to retention of that tracker but argues that the Attorney General lacks standing in the matter because the tracker does not affect customers' rates and has the potential to harm only the now-acquiescent Consumers. But by this reasoning, only Consumers had standing to object to the tracker in the first instance. Yet there was no challenge to the PSC's standing below. Consumers joined the Attorney General in urging discontinuation of the tree-trimming/forestry tracker before the PSC, so it had no incentive to challenge the latter's standing at that time. But the PSC was in a position to do so and did not. Assuming, without deciding, that the Attorney General was vulnerable to a standing challenge below, we deem appellate objections forfeited because none was raised. See *In re Complaint of Mich Cable Telecom Ass'n*, 241 Mich App 344, 361-362; 615 NW2d 255 (2000) (affirming a decision to reject a challenge to a party's standing on the ground that the challenge was not timely brought); *In re Forfeiture of $28,088*, 172 Mich App 200, 205; 431 NW2d 437 (1988) (declining to entertain the appellee's challenge to the claimant-appellant's standing where the issue was not raised below and there was no cross-appeal). For these reasons, we will consider the

tree-trimming/forestry tracker as part of the claim that the PSC engaged in improper retroactive ratemaking.

The PSC possesses only that authority granted to it by the Legislature. *Attorney General v Pub Serv Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998). Words and phrases in the PSC's enabling statutes must be read narrowly and in the context of the entire statutory scheme. *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 155-159; 596 NW2d 126 (1999).

In the absence of specific statutory authorization, retroactive ratemaking in utility cases is prohibited. *Mich Bell Tel Co v Pub Serv Comm*, 315 Mich 533, 547, 554-555; 24 NW2d 200 (1946). This Court has discoursed broadly on the scope of this rule:

> Past expenses and costs are factors to be considered in determining what the new rate should be so it is fair and reasonable. Past expenses and costs are not recoverable under a future rate. If a rate structure is wrong and causes a utility to lose $1,000,000, the utility cannot recover that in its new rate. The commission must certainly raise the rate so the loss will not continue. If the rate structure is wrong so the utility gains $1,000,000 more profit than is reasonable and just, the commission cannot order a refund. It can certainly lower the rate so there will be no excess profit in the succeeding years. [*Detroit Edison Co v Pub Serv Comm*, 82 Mich App 59, 68; 266 NW2d 665 (1978).]

More recently, however, this Court took a narrower view of what constituted retroactive ratemaking, declaring that such does not occur where an agreement between a utility and the PSC does not change existing rates, "is consensual, applies on a prospective basis only, and . . . one-time refunds are merely potential, not guaranteed." *Attorney General v Pub Serv Comm*, 206 Mich App 290, 297; 520 NW2d 636 (1994).

Similarly, this Court has affirmed the PSC's decision to allow a utility to recover accrued retirement benefits that were deferred from the prior year. *Detroit Edison Co v Pub Serv Comm*, 221 Mich App 370, 374-376; 562 NW2d 224 (1997). This Court explained, "The PSC has discretion to determine what charges and expenses to allow as costs of operation. What reasonable accounting method to employ is a legislative decision to be made by the PSC." *Id.* at 375 (citation omitted). This Court reiterated that "[r]etroactive ratemaking . . . is prohibited," but added that retroactive ratemaking "involves a change either upward or downward in the rates charged by a utility for its service under a lawful order" and thus does not take place where a prospective rate takes into account a past expense. *Id.* at 376.

Still more recently, this Court has held that the PSC "did not exceed the scope of its authority by permitting [a utility] the use of deferred cost accounting for storm-related expenses" and added that "because previous rates were not charged to correct further deficiencies caused by the storms, retroactive ratemaking did not occur." *Attorney General v Pub Serv Comm*, 262 Mich App 649, 655; 686 NW2d 804 (2004). This Court so concluded because "there was no adjustment to previously set rates, but only future rates were affected." *Id.* at 658. This Court approved using the accounting convention whereby storm-related expenses dating from one year were characterized as expenses incurred in the subsequent years to which they were deferred. *Id.*

Guided by this caselaw, we conclude there was no error in the authorization of the tree-trimming/forestry tracker and electric choice incentive mechanism. Those devices simply and properly enable Consumers to recover actual expenses incurred in a given year by

accounting for them as subsequent years' expenses to be reflected in new rates with properly prospective effect.

III. THE LOW-INCOME AND ENERGY EFFICIENCY FUND

The Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq.*, was enacted into law on June 3, 2000. *In re Application of Consumers Energy Co*, 279 Mich App at 182, citing 2000 PA 141. Among the provisions of that legislative scheme was creation of the low-income and energy efficiency fund (LIEEF), "which was intended to provide shut-off and other protection for low-income customers and to promote energy efficiency by all customer classes." 279 Mich App at 183 (internal quotation marks and citation omitted).

2008 PA 286 rewrote MCL 460.10d, but at the time of the litigation of, and decision in, this case, the statute provided in pertinent part as follows:

> (1) Except as otherwise provided under subsection (3) or unless otherwise reduced by the commission under subsection (5), the commission shall establish the residential rates for each electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 that will result in a 5% rate reduction from the rates that were authorized or in effect on May 1, 2000. Notwithstanding any other provision of law or commission order, rates for each electric utility with 1,000,000 or more retail customers established under this subsection become effective on June 5, 2000 and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003.
>
> * * *
>
> (5) If the commission authorizes an electric utility to use securitization financing under section 10i, any savings

> resulting from securitization shall be used to reduce retail electric rates from those authorized or in effect as of May 1, 2000 as required under subsection (1). A rate reduction under this subsection shall not be less than the 5% required under subsection (1). The financing order may provide that a utility shall only issue securitization bonds in an amount equal to or less than requested by the utility, but the commission shall not preclude the issuance of an amount of securitization bonds sufficient to fund the rate reduction required under subsection (1).
>
> (6) Except for savings assigned to the low-income and energy efficiency fund under subsection (7), securitization savings greater than those used to achieve the 5% rate reduction under subsection (1) shall be allocated by the commission to further rate reductions or to reduce the level of any charges authorized by the commission to recover an electric utility's stranded costs. The commission shall allocate approved securitization, transition, stranded, and other related charges and credits in a manner that does not result in a reallocation of cost responsibility among the different customer classes.
>
> (7) If securitization savings exceed the amount needed to achieve a 5% rate reduction for all customers, then, for a period of 6 years, 100% of the excess savings, up to 2% of the electric utility's commercial and industrial revenues, shall be allocated to the low-income and energy efficiency fund administered by the commission. The commission shall establish standards for the use of the fund to provide shut-off and other protection for low-income customers and to promote energy efficiency by all customer classes. The commission shall issue a report to the legislature and the governor every 2 years regarding the effectiveness of the fund.

The Attorney General points out that the PSC has allowed Consumers to fund the LIEEF through general utility rates instead of by securitization financing and to do so beyond the six-year period specified by MCL 460.10d(7) and argues that the PSC has thus improp-

erly deviated from these statutory particulars. We disagree.

In *In re Application of Consumers Energy*, 279 Mich App at 190-191, this Court addressed this very issue and resolved it in favor of the PSC. Specifically, this Court held that "MCL 460.10d(7) delineates a source for funding the LIEEF, but does not *restrict* funding of the LIEEF to excess securitization savings," and that "the Legislature has indicated its intent for the continuation of the LIEEF through the provision of ongoing appropriations beyond the initial six-year period." *Id*. at 191.

The Attorney General takes issue with this Court's reasoning in that case and expresses hopes for satisfaction in the Supreme Court. But our Supreme Court denied the application for leave. 483 Mich 880 (2009). Accordingly, *In re Application of Consumers Energy*, 279 Mich App 180, remains binding authority for this issue, see MCR 7.215(J)(1), and demands resolution in favor of the PSC's position.

IV. FUNDING OF CONSULTANTS

The PSC summarized this issue as follows:

> [T]he Commission Staff (Staff) and Consumers filed a joint motion seeking Commission authority for the Staff to retain the services of two independent consultant experts to be financed by Consumers. One consultant is needed to make an assessment of Consumers' environmental compliance programs and the other is needed to make an assessment of issues concerning Consumers' load study and class cost of service study.
>
> Specifically, the Staff argues that . . . [r]etaining independent expert consultants will allow the thorough and expeditious investigation and analysis of Consumers' application.

> The joint motion proposes that Consumers solicit bids from experts after obtaining the scope of the necessary work from the Staff. Subsequently, all bid responses would be submitted only to the Staff. The Staff stresses that it would retain exclusive discretion to select the consultants from the bids submitted and supervise all of the experts' work. Consumers agrees to pay for the Staff's consultants but would "in no way be responsible for their hiring, supervision, conclusions, reports, or expert witness testimony if needed." The Staff argues that Consumers is willing to pay the consultants' fees and emphasizes that the Staff will have exclusive control and responsibility for hiring and supervising the consultants for the decisions regarding the use of the consultants' work products. [Citation omitted.]

After noting the Attorney General's objections, the PSC concluded that the situation did not constitute receipt of a gift or loan from Consumers. The PSC opined that the appearance of impropriety was avoided by placing the consultants under its staff's exclusive control and supervision. The PSC additionally noted that there was precedent requiring a regulated utility to provide the PSC staff with an expert consultant.

We conclude that the PSC erred in allowing Consumers to cover any of the PSC's ordinary operational expenses, including the engagement of experts to aid in its investigation attendant to Consumers' request for a rate hike.

The PSC acknowledged that its staff would normally begin the solicitation process according to the ordinary course of business, with the money for consultants coming from the PSC's budget as appropriated by the Legislature and assessed against all regulated utilities in accord with MCL 460.112,[1] but that financial hard-

[1] This statute directs the Department of Commerce, "within 30 days after the enactment into law of any appropriation to it," to "ascertain the

ship led the PSC to accept Consumers' offer to cover the costs of consultants in this instance. This had the effect of bypassing the statutory avenues for funding and putting the regulated utility in a position, whether at the PSC's initiative or its own, of covering operational costs that the PSC would normally have to cover in the first instance from its own appropriations.

The PSC regarded as instructive MCL 460.568(3), which authorizes it to assess certificate application fees from an electric utility or transmission company to cover the commission's administrative costs in processing the application and to "require the electric utility, affiliated transmission company, or independent transmission company to hire consultants chosen by the commission to assist the commission in evaluating those issues the application raises." Although that statute does indeed show that the Legislature envisioned no impropriety from having the regulated utility provide the PSC with consultants in that situation, that the Legislature has singled out certificate applications from electric utilities or transmission companies in authorizing the PSC to engage consultants paid for by the applicants suggests that such an arrangement is not lawful in situations where, as in the instant situation, it is not explicitly authorized by statute.

We agree with the Attorney General that the PSC's allowing a party before it to cover directly part of its normal operational expenses creates the appearance of impropriety and unfortunate precedent. Even if all concerned had only the best of intentions in this instance, we find it easy to imagine situations where the PSC appears to strong-arm parties before it into them-

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amount of the appropriation attributable to the regulation of public utilities" and to assess that amount against those utilities as apportioned among them in specified ways.

selves bearing the PSC's normal operating expenses, or where regulated parties hope to gain some advantage, or avoid some disadvantage, by offering such support—whether asked or merely permitted to do so in the first instance. We therefore hold that the PSC acted outside its scope of authority in resorting to this arrangement for the funding of the two consultants.

Still, we note that there is no suggestion that the disapproved procedure resulted in biased experts or a result more favorable to Consumers than otherwise would have ensued in this instance. Accordingly, to disturb the result below because of this irregularity would be to elevate form over substance. We therefore deem the error harmless for present purposes. But we hereby admonish the PSC to accept funding for consultants from a regulated party only where statutorily authorized.

V. INTEREST AND POSTAGE

Appellant Forner argues that the PSC should have required Consumers to pay interest as part of its refunding of an improper subsidy to an appliance service program (ASP) and should also have included certain postage costs as among the expenses Consumers incurred in providing services to that ASP and thus subject to allocation to it.

These issues were in fact fully raised and decided in the PSC's favor in a complaint action, Case No. U-14329. This Court affirmed that decision in its entirety. *Forner v Pub Serv Comm*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2008 (Docket No. 270941). The instant appeal is of the result in the general rate case that accounted for the subsidy at issue, and Forner apparently sees it as an opportunity to revisit issues that were, or could have

been, decided in the earlier proceedings. But the PSC, citing the earlier litigation, declined to address these issues in the instant case. We agree that the PSC's forbearance in this regard was appropriate.

The statutory provisions governing the operation of ASPs are distinct from those governing ratemaking. The earlier complaint action determined the existence of an improper subsidy and its remedy. In the instant ratemaking action, the PSC properly confined itself to ensuring that those earlier determinations were reflected in the new rates. Further, to the extent that preclusion doctrines are applicable, they too militate against addressing the question of interest, or revisiting the one of postage.

> Under the doctrine of res judicata, "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." Black's Law Dictionary (6th ed, 1990), p 1305. The doctrine operates where the earlier and subsequent actions involve the same parties or their privies, the matters of dispute could or should have been resolved in the earlier adjudication, and the earlier controversy was decided on its merits. [*Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998).]

The doctrine applies "to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 11; 672 NW2d 351 (2003) (internal quotation marks and citations omitted). "If the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata." *Id.*

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006), citing 1 Restatement Judgments, 2d, § 27, p 250. In contrast to res judicata, "[c]ollateral estoppel conclusively bars only issues 'actually litigated' in the first action." *VanDeventer v Mich Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988).

However, ratemaking is a legislative, rather than a judicial, function, and thus the doctrines of res judicata or collateral estoppel "cannot apply in the pure sense." *Pennwalt Corp v Pub Serv Comm*, 166 Mich App 1, 9; 420 NW2d 156 (1988). Even so, issues fully decided in earlier PSC proceedings need not be "completely relitigated" in later proceedings unless the party wishing to do so establishes by new evidence or a showing of changed circumstances that the earlier result is unreasonable. *Id.*

We conclude that the question of interest was inherently included with the overall determination of the amount of billing relief to which the ratepayers were entitled as the remedy for Consumers' improper subsidy of its ASP and, thus, should have been raised, if at all, in the proceedings that resulted in that determination. No new evidence or change of circumstances has suddenly thrown the question of interest into some new light.

But the requirement to come forward with new evidence or a showing of changed circumstances to obtain renewed consideration of an issue decided in earlier proceedings applies to questions of fact; there is no such requirement where the question at issue is one

of law. *Consumers Energy Co v Pub Serv Comm*, 268 Mich App 171, 177-178 n 3; 707 NW2d 633 (2005). Forner insists that interest is statutorily required in this situation, citing MCL 460.10(2)(d)-(e) and MCL 460.10a(4)-(5). In fact, the cited subsections of MCL 460.10 simply declare as among the purposes of the Customer Choice and Electricity Reliability Act to "ensure that all persons in this state are afforded safe, reliable electric power at a reasonable rate," MCL 460.10(2)(d), and to "improve the opportunities for economic development in this state and to promote financially healthy and competitive utilities in this state," MCL 460.10(2)(e). The cited subsections of MCL 460.10a in turn call for the PSC to establish a code of conduct for electric utilities to prevent "cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services," MCL 460.10a(4), and authorize an electric utility to offer an ASP. Given that these authorities merely set forth certain goals and methods for reaching them, with no provision for remedies for any failure to comply, Forner's argument that those authorities require an assessment of interest whenever rates are adjusted to compensate for improper subsidization of an ASP is strained.

For these reasons, the PSC's disinclination to consider the question of interest in the instant proceeding was neither unlawful nor otherwise unreasonable.

Concerning Forner's argument about subsidization of postal costs, this Court earlier concluded that "[t]he PSC's determination that Consumers' ASP program should not be charged for postage because the postage subsidy created when Consumers includes an ASP program advertising insert in its regular billing envelopes is zero is a rational exercise of Consumers' ability

to set rates, is not arbitrary and capricious, and is not inconsistent with other decisions." *Forner*, unpub op at 5. If the PSC's treatment of that issue were legislative in nature, this Court's disposal of it was an adjudication that triggered the preclusion doctrine. The PSC properly eschewed consideration of that issue anew.

For these reasons, we conclude that the PSC properly declined to take up the question of interest or revisit that of postage.

We affirm.

TRUEL v CITY OF DEARBORN

Docket No. 290600. Submitted May 5, 2010, at Detroit. Decided December 14, 2010, at 9:10 a.m.

Christopher Truel, a police officer in the city of Dearborn, brought suit in the Wayne Circuit Court against the city of Dearborn and several of its police officers, alleging violations of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. He alleged that he had cooperated in investigations regarding a bar fight that allegedly involved several Dearborn police officers, and he asserted that he consequently had been investigated for being a "dirty cop" and that he suffered depression and anxiety from these incidents. He alleged that the Wayne County Prosecuting Attorney's office (WCPO) and the Michigan State Police had conducted an investigation regarding the bar fight and had concluded that it did not involve any illegal activity by Dearborn police officers. Defense counsel requested the file from the investigation under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The WCPO responded to the request, but withheld the statements of four Dearborn police officers, given pursuant to investigative subpoenas, and the final report of the investigation. Defense counsel then subpoenaed the information that had been withheld and the WCPO denied the request, claiming that the materials were privileged work product and protected by the deliberative process privilege, and that transcripts of the statements and records were confidential under MCL 767A.8. Defendants then filed a motion to compel discovery in plaintiff's action, and the court, Gershwin A. Drain, J., granted the motion. The WCPO appealed.

The Court of Appeals *held*:

1. MCL 767A.8 makes confidential certain items related to an investigation, including (1) petitions for immunity, (2) orders granting immunity, (3) transcripts of testimony delivered to witnesses pursuant to grants of immunity, and (4) records, documents, and physical evidence obtained by the prosecuting attorney pursuant to an investigation under the investigative-subpoena statutes. Under MCL 767A.5(6), transcripts of witness testimony are only available to a criminal defendant when the charges result

from information obtained through investigative subpoenas and (a) the testimony is that of the defendant or (b) the testimony is that of witnesses who will testify at trial. Because defendants were not entitled to the transcripts of statements given by the four police officers, the trial court abused its discretion by granting defendants' motion to compel the WCPO to produce the transcripts.

2. The deliberative-process privilege protects governmental material that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. The privilege is qualified rather than absolute, and it can be overcome by a sufficient showing of need, which must be determined on a case-by-case, ad hoc basis. The court must balance the evidentiary need against the harm that could result from disclosure, taking into account such factors as the relevance of the evidence, the availability of other evidence, the seriousness of the case, the role of the government, and the chilling effect on future governmental action. Plaintiff's suit was premised on his compliance in the investigations into the bar fight and alleged subsequent cover-up. Because the mere act of participating in the investigations is itself protected activity, the truth and credibility of the subpoenaed statements of the police officers is irrelevant to a determination whether defendants harassed plaintiff, denied him promotions, and accused him of misconduct, and the trial court abused its discretion by granting defendants' motion to compel the WCPO to produce the final report of the investigation.

Reversed and remanded.

1. PRETRIAL PROCEDURE — DISCOVERY — INVESTIGATIVE SUBPOENAS — CONFIDENTIALITY.

MCL 767A.8 makes confidential certain items related to an investigation, including (1) petitions for immunity, (2) orders granting immunity, (3) transcripts of testimony delivered to witnesses pursuant to grants of immunity, and (4) records, documents, and physical evidence obtained by the prosecuting attorney pursuant to an investigation under the investigative-subpoena statutes; under MCL 767A.5(6), transcripts of witness testimony are only available to a criminal defendant when the charges result from information obtained through investigative subpoenas and (a) the testimony is that of the defendant or (b) the testimony is that of witnesses who will testify at trial.

2. PRETRIAL PROCEDURE — DISCOVERY — GOVERNMENTAL AGENCY DOCUMENTS — DELIBERATIVE-PROCESS PRIVILEGE.

The deliberative-process privilege, which protects certain governmental material, is qualified rather than absolute and can be overcome by a sufficient showing of need, which must be determined on a case-by-case, ad hoc basis in which the court balances the evidentiary need against the harm that could result from disclosure, taking into account such factors as the relevance of the evidence, the availability of other evidence, the seriousness of the case, the role of the government, and the chilling effect on future governmental action.

Morgan & Meyers, PLC (by *Courtney E. Morgan, Jr.*, and *Brian J. Nagy*), for Christopher Truel.

Debra A. Walling, Corporation Counsel, and *Kimberly M. Craig*, Assistant Corporation Counsel, for the City of Dearborn, Michael Celeski, Joseph Doulette, and Jeffrey Geisinger.

Kym L. Worthy, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Jason W. Williams*, Assistant Prosecuting Attorney, for the Wayne County Prosecuting Attorney's Office.

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

WILDER, J. Appellant Wayne County Prosecutor's Office (WCPO) appeals by delayed leave granted[1] an order granting defendants' motion to compel discovery and requiring the WCPO to "produce its entire file to Defendants' Counsel, including factual and deliberative material." We reverse and remand for further proceedings.

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[1] *Truel v City of Dearborn*, unpublished order of the Court of Appeals, entered March 2, 2009 (Docket No. 290600).

I

According to the complaint, plaintiff, a Dearborn police officer, was dispatched to Falls Sports Lounge on February 15, 2004, to investigate a report of a bar fight. Plaintiff alleged that, upon arrival, he saw several Dearborn police officers exiting the back door. He further alleged that the chief of police, Michael Celeski, and another Dearborn police officer, Joseph Doulette, were "in the bar area" and "appeared to have just been involved in a fight." Another person was "lying on the floor of the bar covered in blood." Plaintiff learned from a witness that Celeski was one of the people who started the fight and "had been swinging a pool stick during the actual altercation." Plaintiff alleged that Celeski told him that, if he knew what was good for him, he would "end the investigation and 'get the f*** out of here.' " Plaintiff obeyed his commanding officer.

Plaintiff alleged that, following the Fall Sports Lounge incident, he was harassed and ridiculed by other members of the department, including those in command, and he was denied promotions. Plaintiff maintained that he cooperated in investigations regarding this incident by the Dearborn City Council, the Michigan State Police, and the WCPO. A week after plaintiff "answered an investigative subpoena" and testified under oath, plaintiff found himself under investigation for allegedly being a "dirty cop." Plaintiff's doctors subsequently "ordered [him] off work . . . due to depression and anxiety related to post traumatic stress directly stemming" from these incidents as well as an unrelated shooting involving another officer. Plaintiff then sued defendants for violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*.

As alleged in the complaint, the WCPO and the Michigan State Police conducted an investigation re-

garding "potential misconduct by members of [the Dearborn] police department at the Fall's [sic] Lounge in 2004" and "concluded that there [was] no credible evidence of any illegal activities by members of [the] department." After plaintiff initiated his WPA action, defense counsel requested "the entire investigative file" from the investigation, including "any and all interviews, transcripts, notes, etc." under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The WCPO responded to the request, but withheld "statements given by four Dearborn Police Officers pursuant to the investigative subpoenas" and "a final report of the investigation." Corporation counsel then requested by subpoena the information that had been withheld, and the WCPO denied the request, claiming that the materials were "privileged work product" and protected under "the deliberative process privilege," and that transcripts of the statements and records were confidential under MCL 767A.8. Defendants thereafter filed a motion to compel discovery in plaintiff's action, which the trial court granted.

II

At the outset, we note that "the discovery rules and the FOIA represent 'two independent schemes for obtaining information." *Central Mich Univ Supervisory-Technical Ass'n MEA/NEA v Central Mich Univ Bd of Trustees*, 223 Mich App 727, 731; 567 NW2d 696 (1997) (HOLBROOK, J., concurring) (citation omitted). Therefore, discovery in a civil action and the FOIA are subject to different procedures and enforcement mechanisms.

Under the FOIA, a person has a right to inspect a public record of a public body upon written request unless the record is exempt from disclosure. MCL 15.233(1). The public body must furnish the person

with a reasonable opportunity to inspect and examine the records. MCL 15.233(3). If a public body denies all or part of a request for a public record, the person requesting the document may either appeal the decision to the head of the public body or file a civil action in the circuit court to compel the public body to disclose the public record. MCL 15.240(1). This appeal must be decided without reference to FOIA because there is nothing in the record to show that defendants satisfied the requirements of MCL 15.240(1) by appealing the denial if their discovery requests to the head of the WCPO, or by filing a separate FOIA civil action in the circuit court.

However, in this claim under the WPA, as in a civil action generally, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party . . . ." MCR 2.302(B)(1). Discovery may be obtained "by any means provided in subchapter 2.300" of the court rules. MCR 2.302(A)(1). Any person may be deposed pursuant to MCR 2.306(A)(1). The deponent may be subpoenaed to appear and may be directed to produce documents or other tangible things. MCR 2.306(B)(1) and (3). A deposition notice and subpoena "may provide that the deposition is solely for producing documents . . . for inspection and copying, and that the party does not intend to examine the deponent." MCR 2.305(A)(3). If the deponent objects, "the party serving the subpoena is not entitled to inspect and copy the materials without an order of the court in which the action is pending." MCR 2.305(B)(2). "The party serving the subpoena may, with notice to the deponent, move for an order compelling production of the designated materials." MCR 2.305(B)(3). Thus, because de-

fendants have disputed the denial of their subpoena requesting the withheld information, a motion to compel was an appropriate means by which to seek its production.

A. APPLICABILITY OF MCL 767A.8

On appeal, the WCPO argues that the transcripts of statements given by the four police officers cannot be disclosed under the investigative-subpoena statutes. We agree. A trial court's ruling on a discovery motion is reviewed for an abuse of discretion. *Holman v Rasak*, 281 Mich App 507, 508; 761 NW2d 391 (2008). We review de novo issues of privilege, *In re Costs & Attorney Fees*, 250 Mich App 89, 98; 645 NW2d 697 (2002), questions of law, including the interpretation of statutes, *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003), and the construction, interpretation, and application of the court rules, *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003); *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002).

The rules of statutory construction require that courts give effect to the Legislature's intent. *Bush v Shabahang*, 484 Mich 156, 166; 772 NW2d 272 (2009). Courts should first look to the specific statutory language to determine the intent of the Legislature, which is presumed to intend the meaning that the statute plainly expresses. *Institute in Basic Life Principles, Inc v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996). "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). If reasonable minds could differ regarding the meaning of a statute,

judicial construction is appropriate. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998).

The investigative-subpoena statutes permit the prosecuting attorney to petition the court for an investigative subpoena. MCL 767A.2(1). The petition must identify "each person who will be questioned or who will be required to produce material" and the "records, documents, or physical evidence to be examined," and explain why "the testimony of the person or examination of the records, documents, or physical evidence is relevant to the investigation." MCL 767A.2(2)(b), (c), and (d). If the petition is approved, the subpoena must set forth "[t]he time and place for taking the person's testimony or for the person to produce the required documents or physical evidence" and "describ[e] the records, documents, or physical evidence" to be produced. MCL 767A.4(1)(b) and (e). "A person properly served with an investigative subpoena . . . shall appear before the prosecuting attorney and answer questions concerning the felony being investigated or produce any records, documents, or physical evidence he or she is required to produce." MCL 767A.5(1). The prosecutor may, with court approval, grant immunity to a person "whom the prosecuting attorney intends to require to give testimony concerning" the matter under investigation. MCL 767A.7(1). If a criminal charge is filed against a person as a result of information obtained during the investigation, that person is entitled to a copy of the testimony he provided in response to a subpoena as well as that of every subpoenaed witness who will testify at trial. MCL 767A.5(6).

MCL 767A.8 provides:

> Petitions for immunity, orders of immunity, transcripts of testimony delivered to witnesses pursuant to grants of immunity, and records, documents, and physical evidence

> obtained by the prosecuting attorney pursuant to an investigation under this chapter are confidential and shall not be available for public inspection or copying or divulged to any person except as otherwise provided in this chapter. Material and information obtained under this act are exempt from disclosure under the [FOIA].

The plain language of § 8 makes several delineated items related to an investigation confidential, including (1) petitions for immunity, (2) orders granting immunity, (3) "transcripts of testimony delivered to witnesses pursuant to grants of immunity,"[2] and (4) "records, documents, and physical evidence obtained by the prosecuting attorney pursuant to an investigation under this chapter." Given the act's repeated references to testimony or answering questions on the one hand and records, documents, or physical evidence on the other hand, and the fact that one or the other or both may be subpoenaed, MCL 767A.2(2), it appears that testimony is not the same as "records, documents, or physical evidence." The distinction is supported by dictionary definitions, which indicate that "testimony" is a statement or declaration given by a witness under oath, whereas a "document" is a written or printed paper furnishing information or some other written item and a "record" is a written account of facts or events.

[2] Why "transcripts of testimony delivered to witnesses pursuant to grants of immunity" should specifically be confidential is not entirely clear because unlike the grand jury act after which it is modeled, Senate Legislative Analysis, SB 85, August 10, 1995, p 4, the investigative subpoena act does not otherwise provide that transcripts of testimony given under a grant of immunity be given to the testifying witness. Cf. MCL 767.19b(3) (a witness who testifies before a grand jury under a grant of immunity is entitled to a transcript of his testimony if he is prosecuted for an offense in violation of the grant of immunity) and MCL 767.19f(3) (transcripts of testimony "delivered to a witness pursuant to his or her grant of immunity" cannot be disclosed to anyone other than "his or her attorney").

Random House Webster's College Dictionary (1997), pp 385, 1087, 1330. While a transcript of testimony certainly could be considered a record or document, given that it is a written copy of oral testimony, Black's Law Dictionary (7th ed), p 1503, it is not a record or document "obtained by the prosecuting attorney pursuant to an investigation under this chapter." Rather, a transcript is a subsequent reduction to writing of testimony "obtained under this act." Defendants argue that the only transcripts treated as confidential under the investigative-subpoena statutes are those "of testimony delivered to witnesses pursuant to grants of immunity." However, this interpretation does not harmonize and give effect to §8 and the investigative subpoena statutes as a whole. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010); *Bush*, 484 Mich at 167.

The delineated items in § 8 were clearly not intended to be an all-encompassing expression of the elements of an investigation that are considered confidential. For example, the petition for an investigative subpoena itself is confidential, MCL 767A.2(5), and MCL 767A.5(6) provides for the limited disclosure of testimony to a defendant who has been charged based upon information obtained pursuant to the investigative-subpoena statutes. The more likely explanation is that the delineated items in § 8 were meant to address those matters not already covered elsewhere in the act. Further, it would make little sense in § 8 to specifically exempt all "[m]aterial and information" obtained during the investigation, which would certainly include witness testimony and transcripts thereof, from disclosure under the FOIA if the same material and information were not intended to be confidential under the investigative-subpoena statutes "except as otherwise provided in this chapter." We reject an interpretation that the Legislature intended that transcripts of wit-

ness testimony be available upon request as long as the request is not made under the FOIA.

Because transcripts of witness testimony are only available to a criminal defendant when the charges result from information obtained through investigative subpoenas and (a) the testimony is that of the defendant or (b) the testimony is that of witnesses who will testify at trial, MCL 767A.5(6), defendants here are not entitled to the transcripts of statements given by the four police officers. Therefore, the trial court abused its discretion by granting defendants' motion to compel the WCPO to produce the transcripts.

B. APPLICABILITY OF THE DELIBERATIVE-PROCESS PRIVILEGE

As we noted earlier in this opinion, parties may obtain discovery of any matter that is relevant and not privileged. MCR 2.302(B)(1). "Privilege is governed by the common law, except as modified by statute or court rule." MRE 501.

In *Ostoin v Waterford Twp Police Dep't*, 189 Mich App 334, 337; 471 NW2d 666 (1991), the Court adopted the deliberative-process privilege recognized under federal law. According to the *Ostoin* Court, "the central question . . . is whether the material sought is factual or evaluative" because "factual material falls outside the scope of the privilege; to be protected, the material must comprise part of the deliberative or evaluative process." *Id.* at 338. Another court described the privilege as follows:

> [I]t allows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Although this privilege is most commonly encountered in Freedom of Information Act . . . litigation,

> it originated as a common law privilege. Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative. Both requirements stem from the privilege's "ultimate purpose[, which] . . . is to prevent injury to the quality of agency decisions" by allowing government officials freedom to debate alternative approaches in private. The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations. [*In re Sealed Case*, 326 US App DC 276, 284; 121 F3d 729 (1997) (citations and footnote omitted, last edit in original).][3]

In *NLRB v Sears, Roebuck & Co*, 421 US 132, 152 n 19; 95 S Ct 1504; 44 L Ed 2d 29 (1975), the Supreme Court noted that there is not always a bright line between predecisional documents and postdecisional documents because a document may include both an explanation of a "decision just made," which is postdecisional, and guidelines for future analogous decisions, which is predecisional.

Because the privilege is qualified rather than absolute, it can be overcome by a sufficient showing of need. *Ostoin*, 189 Mich App at 338. "This need determination is to be made flexibly on a case-by-case, ad hoc basis." *In re Sealed Case*, 326 US App DC at 284. The court must balance the evidentiary need against the harm that could result from disclosure, taking into account such factors as the relevance of the evidence, the availability of other evidence, the seriousness of the case, the role of the government, and the chilling effect on future government action. *Id*. at 284-285.

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[3] Decisions from lower federal courts are not binding but may be considered persuasive. *Walters v Nadell*, 481 Mich 377, 390 n 32; 751 NW2d 431 (2008).

The trial court determined that the WCPO's final report of the investigation was subject to the deliberative-process privilege, but that defendants had overcome the privilege by the showing of need. The trial court declined to review the final report in camera before making its ruling and it is unclear from the record on appeal whether the final report contained deliberative, predecisional information. *NLRB*, 421 US at 152 n 19. However, if defendants wished to contest the trial court's failure to review the final report and the conclusion that it fell within the deliberative-process privilege, defendants should have filed a cross-appeal with this Court. Although an appellee need not file a cross-appeal to argue an alternative basis for affirming the trial court's decision, an appellee cannot obtain a decision more favorable than the decision rendered by the trial court. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 350-351; 725 NW2d 684 (2006). Therefore, we shall limit our review to the WCPO's claim on appeal that the trial court abused its discretion when it found that defendants demonstrated a sufficient showing of need to compel production of the final report.

Defendants contend that they need the final report to discover why the WCPO determined "that there is no credible evidence of any illegal activities by members of [the] department," which may have resulted from a finding that "[p]laintiff's report was false and whether the Plaintiff knew that it was false." Defendants further contend that the final report may contain information relevant to plaintiff's credibility about the Falls Sports Lounge incident. As plaintiff counters, however, defendants have misapprehended the nature of the claim against them.

The WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362.]

The elements of a cause of action under the WPA are (1) the plaintiff was engaged in a protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). There are three types of protected activity: "(1) reporting to a public body a violation of a law, regulation, or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation." *Ernsting v Ave Maria College*, 274 Mich App 506, 510; 736 NW2d 574 (2007). The first two types of activity are protected, "unless the employee knows that the report is false." MCL 15.362. In other words, reporting or being about to report violations or suspected violations is protected if the report is or is about to be made in good faith. Truth or falsity is not an element of the third type of protected activity because the employee does not report or anticipate reporting violations or suspected violations but is sought as a source of information by a public body that is investigating violations or suspected violations. *Id*.

The crux of plaintiff's complaint is that he was involved in the third type of protected activity—defendants allegedly discriminated against plaintiff in retaliation for "comply[ing] with the requests of the Mayor of Dearborn, the Michigan State Police and [WCPO] to participate in their respective investigations into the Falls Sports Lounge incident and subsequent cover-up by Defendants." The mere act of participating in the investigations is itself protected activity. *Shaw v Ecorse*, 283 Mich App 1, 11-12; 770 NW2d 31 (2009). Whatever plaintiff may have reported pursuant to the investigation and any evaluation of the truth and credibility of that testimony by the WCPO is irrelevant to a determination whether defendants harassed plaintiff, denied him promotions, and accused him of misconduct because he participated in a public body's investigation. Accordingly, we conclude that the trial court erred in finding that defendants demonstrated a sufficient showing of need for the final report to overcome the deliberative-process privilege and consequently, the trial court abused its discretion by granting defendants' motion to compel the WCPO to produce the report.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

GRIMM v DEPARTMENT OF TREASURY

Docket No. 293457. Submitted November 5, 2010, at Grand Rapids. Decided December 16, 2010, at 9:00 a.m.

Petitioner, Robert S. Grimm, a corporate officer of Affiliated Insurance Agency, was assessed by respondent, the Department of Treasury, more than a million dollars in unpaid corporate taxes under MCL 205.27a(5). Petitioner's counsel received notice of the final assessment from respondent on August 1, 2008, in a letter dated July 22, 2008. On August 5, 2008, petitioner's counsel gave a petition contesting the final assessment to a delivery service designated by the Tax Tribunal for the delivery of such petitions. The Tax Tribunal received the petition from the overnight delivery service on August 6, 2008. On December 16, 2008, the Tax Tribunal entered an order placing petitioner in default because proof of service to the respondent was lacking, as were the assessment numbers being appealed. Petitioner's counsel then provided the required proof of service, but not the assessment numbers being appealed. On January 8, 2009, the Tax Tribunal entered an order dismissing the petition because the default had not been cured. Petitioner received copies of the assessments on February 19, 2009, and, instead of moving to set aside the dismissal, filed the assessment numbers being appealed with the Tax Tribunal on March 9, 2009. The parties then filed a joint stipulation requesting an abeyance pending the outcome of an informal conference regarding the assessments. The Tax Tribunal denied the motion to abey, reasoning that because the matter had already been dismissed good cause to grant the motion was lacking. The Tax Tribunal also determined that the original petition was untimely filed and that it, thus, had lacked authority to consider the petition at the outset. The Tax Tribunal ordered that its January 8, 2009, order be corrected to indicate that the untimely filing of the petition resulted in the dismissal of the case. Petitioner appealed.

The Court of Appeals *held*:

1. MCL 205.735a establishes the filing deadlines for petitions contesting tax assessments. Under the statute, a petition regarding the assessment at issue in this case, personal liability for

unpaid corporate taxes under MCL 205.27a(5), must be filed within 35 days after the final assessment. Under MCL 205.735a(7)(c), a petition will be deemed to be timely filed if it is given to a designated delivery service on or before the expiration of the 35-day period and the petition is delivered by the designated delivery service. August 5, 2008, was the last day of the 35-day period that petitioner had to file the petition. The petition was timely filed because petitioner gave the petition to the designated delivery service on August 5, 2008, even though it was not delivered until August 6, 2008. The Tax Tribunal erred in ordering dismissal on the basis that the petition was untimely.

2. The Tax Tribunal should consider the following factors before imposing the sanction of dismissal for failure to comply with its rules or orders: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous orders of the Tax Tribunal; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the Tax Tribunal's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. The record should reflect that the Tax Tribunal, when considering the sanction of dismissal, gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it.

3. Petitioner's failure to produce the assessment numbers was not willful and he had no history of deliberately delaying the proceedings or refusing to abide by the Tax Tribunal's orders. There was no showing that respondent was prejudiced by petitioner's failure to timely cure the defect. Because respondent issued the assessments, it is reasonable to expect that respondent would have been able to determine the assessment numbers corresponding to the periods identified in petitioner's petition. The degree of noncompliance and the lack of resulting prejudice did not warrant dismissal. The Tax Tribunal abused its discretion by dismissing the petition on the basis of petitioner's failure to provide the assessment numbers within the period allotted.

Reversed and remanded.

1. TAXATION — TAX TRIBUNAL — FILING OF PETITIONS IN TAX TRIBUNAL — DESIGNATED DELIVERY SERVICES.

A petition filed in the Tax Tribunal is considered filed on or before the expiration of the period provided in MCL 205.735a for the filing of the petition if the petition is given to a delivery service

designated by the Tax Tribunal for delivery on or before the expiration of the time period and the petition is delivered by the designated delivery service.

2. TAXATION — TAX TRIBUNAL — DISMISSALS.

The Tax Tribunal, before imposing the sanction of dismissal for failure to comply with its rules or orders, should consider (1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with previous orders of the Tax Tribunal, (3) the prejudice to the opposing party, (4) whether there exists a history of deliberate delay, (5) the degree of compliance with other parts of the Tax Tribunal's orders, (6) attempts to cure the defect, and (7) whether a lesser sanction would better serve the interests of justice.

Kemp Klein Law Firm (by *Richard Bisio*) for petitioner.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Heather M. S. Durian*, Assistant Attorney General, for respondent.

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM. Petitioner appeals as of right the Michigan Tax Tribunal's order denying the parties' joint motion to abey and dismissing his petition contesting a final assessment for $1,707,147 of unpaid corporate taxes. The Tax Tribunal ultimately dismissed the petition because it found that the petition was untimely filed. We reverse and remand for further proceedings.[1]

I. BASIC FACTS

Petitioner is a corporate officer of Affiliated Insurance Agency. On July 1, 2008, respondent, the Michigan

[1] This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Department of Treasury, assessed petitioner over a million dollars in unpaid corporate taxes from certain tax periods in 2006 and 2007. These taxes were assessed against petitioner individually under MCL 205.27a(5), which permits such an assessment against a corporate officer who has "control or supervision of, or responsibility for" paying the corporation's taxes.

On August 1, 2008, petitioner's counsel received notice of the final assessment from the department in a letter dated July 22, 2008.[2] On August 5, 2008, petitioner's counsel delivered the petition contesting the final assessment to Federal Express (FedEx) for overnight delivery. The Tax Tribunal received the petition the next day. Petitioner alleged that he was not individually liable for the withheld taxes because he did not have control of the corporation's financial decisions.

On December 16, 2008, the Tax Tribunal entered an order placing petitioner in default because proof of service to the opposing party was lacking, as were the assessment numbers being appealed. On December 31, 2008, petitioner's counsel provided the required proof of service. However, petitioner did not provide the Tax Tribunal with the assessment numbers being appealed, despite efforts to obtain the assessments from respondent. Thus, the Tax Tribunal entered an order of dismissal against petitioner on January 8, 2009, reasoning that petitioner had failed to cure the default.

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[2] Apparently, petitioner did not receive notice of the final assessment until August 1, 2008, and respondent has not shown otherwise, i.e., there is no proof that the final assessment was mailed in early July. Notably, respondent's July 22 letter to petitioner suggests that petitioner did have some type of notice because it states, "We have received and processed your correspondence, dated July 11, 2008, regarding Corporate Officer Liability." However, it cannot be inferred on the basis of this statement that petitioner was in possession of the final assessment numbers.

Petitioner finally received copies of the assessments on February 19, 2009. Instead of moving to set aside the dismissal, petitioner filed the assessment numbers with the Tax Tribunal on March 9, 2009. Subsequently, on March 12, 2009, the parties filed a joint stipulation requesting an abeyance pending the outcome of an informal conference to contest the assessments, consistent with MCL 205.21(2)(c) and (d). On March 26, 2009, the Tax Tribunal denied the parties' joint motion to abey, reasoning that because the case had already been dismissed good cause to grant the motion was lacking. The Tax Tribunal also determined that the original petition was untimely filed, citing MCL 205.22 and *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538; 656 NW2d 215 (2002), and that it, thus, lacked authority to consider the petition at the outset. It ordered that the January 8, 2009, order be corrected to indicate that the untimely filing of the petition resulted in the dismissal of the case. Petitioner moved for a rehearing, but the Tax Tribunal denied the motion. This appeal followed.

II. WAS THE PETITION UNTIMELY FILED?

Petitioner first argues that the Tax Tribunal erroneously determined that the original petition was untimely filed on August 6, 2008, the date it was received, rather than timely filed on August 5, 2008, the date counsel gave it to FedEx. Resolution of this issue requires the interpretation and application of a statute to undisputed facts, which present questions of law that we review de novo. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 38; 761 NW2d 269 (2008). This Court's primary goal in interpreting a statute is to determine and give effect to the Legislature's intent. *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283

Mich App 647, 650; 770 NW2d 915 (2009). Our analysis begins with an examination of the language used. "If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible." *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). However, this Court will generally defer "to the Tax Tribunal's interpretation of a statute that it is delegated to administer." *Beznos v Dep't of Treasury (On Remand)*, 224 Mich App 717, 721; 569 NW2d 908 (1997).

Because this case was commenced after December 31, 2006, MCL 205.735a, which governs the Tax Tribunal's jurisdiction in assessment disputes, is applicable. MCL 205.735a(1). MCL 205.735a provides, in relevant part:

> (6) The jurisdiction of the tribunal in an assessment dispute as to . . . commercial real property, industrial real property, developmental real property, commercial personal property, industrial personal property, or utility personal property is invoked by a party in interest, as petitioner, filing a written petition on or before May 31 of the tax year involved. The jurisdiction of the tribunal in an assessment dispute as to . . . agricultural real property, residential real property, timber-cutover real property, or agricultural personal property is invoked by a party in interest, as petitioner, filing a written petition on or before July 31 of the tax year involved. *In all other matters, the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 35 days after the final decision, ruling, or determination*. . . .

> (7) A petition is considered filed on or before the expiration of the time period provided in this section or by law if 1 or more of the following occur:
>
> (a) The petition is postmarked by the United States postal service on or before the expiration of that time period.
>
> (b) The petition is delivered in person on or before the expiration of that time period.
>
> (c) *The petition is given to a designated delivery service for delivery on or before the expiration of that time period and the petition is delivered by that designated delivery service* or, if the petition is not delivered by that designated delivery service, the petitioner establishes that the petition was given to that designated delivery service for delivery on or before the expiration of that time period. [Emphasis added.]

MCL 205.735a(6) establishes filing deadlines for petitions contesting tax assessments. The first two sentences of subsection (6) address deadlines for contesting certain types of assessments related to real or personal property not involved in the present matter. In all other matters, which would included the assessment at issue here—personal liability for unpaid corporate taxes, MCL 205.27a(5)—the petition must be filed within 35 days after the final assessment. Here, the parties do not dispute that the petition would have been timely filed within this 35-day period if it is considered to have been filed on August 5, 2008. And, it is also clear that the petition was given to a designated delivery service on August 5, 2008, because the FedEx mailing envelope is marked "05AUG08 19:13."[3]

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[3] Under MCL 205.735a(11), " 'designated delivery service' [as used in MCL 205.735a] means a delivery service provided by a trade or business that is designated by the tribunal for purposes of this subsection." Tribunal Notice 2007-6, issued December 20, 2007, and effective Decem-

Thus, the question becomes: Was the petition, which was given to FedEx on August 5, 2008, timely filed consistent with MCL 205.735a(7)? Because it is undisputed that petitioner used a designated delivery service, FedEx Priority Overnight, only subdivision (c) of subsection (7) is applicable. Under this provision, as applicable to the present matter, a petition will be timely filed if it "is given to a designated delivery service for delivery on or before the expiration of that time period and the petition is delivered by that designated delivery service . . . ."

In our view, this portion of the provision is unambiguous. It simply means that the petition must be given to a designated delivery service for delivery on or before the deadline date—it does not have to be delivered by that date—and it must be delivered by that same designated delivery service. This interpretation is supported by Tribunal Notice 2006-5, issued December 28, 2006, and effective December 31, 2006, which provides the following guidance:

> Appeals are deemed to be filed by the appropriate deadline date if received on that date, mailed by first-class mail provided the envelope is postmarked by the United States Postal Service on or before that date, *or delivered by one of the delivery services designated herein provided the appeal was given to the delivery service on or before that date*. [Emphasis added.]

We find this guidance to be persuasive. Tax Tribunal notices are intended to "provide the public an understanding of the Tribunal's interpretation of the Tax Tribunal Act" and its "internal processing practices," and to "assist the Tribunal in clarifying the internal processing practices for administrative staff and ensure

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ber 31, 2007, includes FedEx, and specifically FedEx Priority Overnight, as a designated delivery service for purposes of MCL 205.735a.

uniform, efficient processing of cases among the Tribunal members and its administrative staff." Tribunal Notice 2004-1, issued May 13, 2004. Further, the Tax Tribunal's interpretation is convincing, inasmuch as it does not clearly conflict with MCL 205.735a(7)(c) and it is consistent with the treatment of a filing when it is mailed through the United States Postal Service, i.e., a petition is timely filed if it is postmarked on or before the expiration date of the time period, MCL 205.735a(7)(a). Thus, affording "respectful consideration" to the Tribunal Notice and absent "cogent reasons" for overruling it, *Kmart Mich Prop Servs*, 283 Mich App at 651 (quotation marks and citations omitted), we conclude that under MCL 205.735a(7)(c), a petition will be timely filed if a designated delivery service is given the petition on or before the deadline date and it is subsequently delivered by that same delivery service.

As noted, August 5, 2008, was the last day of the 35-day period that petitioner had to file his petition. See MCL 205.735a(6). And, because petitioner gave the petition to FedEx on August 5, 2008, the petition was timely filed, even though the Tax Tribunal received it the next day after the expiration of the filing deadline. See MCL 205.735a(7)(c). Accordingly, the Tax Tribunal's order of dismissal on the basis that the petition was untimely filed was erroneous.

III. WAS PETITIONER'S FAILURE TO CURE THE DEFAULT GROUNDS FOR DISMISSAL?

Petitioner also challenges the Tax Tribunal's January 8, 2009, original order of dismissal in which the Tax Tribunal dismissed the petition on the basis of petitioner's failure to timely correct the default. Specifically, petitioner did not identify the assessment numbers

being appealed within the required 21 days. We agree with petitioner. We review for an abuse of discretion a decision by the Tax Tribunal to dismiss a petition for failure to comply with its rules or orders. *Prof Plaza, LLC v Detroit*, 250 Mich App 473, 475; 647 NW2d 529 (2002). The abuse-of-discretion standard recognizes that there will be circumstances in which there will be more than one reasonable and principled outcome, and selection of one of these principled outcomes is not an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Petitioner contends that this Court's evaluation of factors analogous to those cited in *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501; 536 NW2d 280 (1995), would indicate that the dismissal was an abuse of discretion and urges the adoption of similar factors here. In *Vicencio*, this Court summarized the factors that a trial court applying the Michigan Court Rules should consider before imposing the sanction of dismissal, including:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Id*. at 507.]

This Court has also evaluated the propriety of Tax Tribunal sanctions by considering similar factors, albeit in unpublished cases.[4] We find the analogy appropriate and adopt the factors summarized in *Vicencio* for the

[4] See, e.g., *Patmon v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued February 22, 2002 (Docket No. 227050), pp 3-4. While we acknowledge that unpublished cases are not binding,

Tax Tribunal to consider before imposing the drastic sanction of dismissal. When considering the sanction of dismissal, the record should reflect that the Tax Tribunal "gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled in part on other grounds in *Dimmitt & Owens Fin, Inc* v *Deloitte & Touche (ISC), LCC*, 481 Mich 618, 628; 752 NW2d 37 (2008).

Here, petitioner failed to comply with the Tax Tribunal's directive that it provide the assessment numbers being appealed within 21 days of the December 16, 2008, order. However, nothing in the record indicates that petitioner's failure to produce the assessment numbers was willful or that petitioner had a history of deliberately delaying the proceedings or refusing to abide by Tax Tribunal orders. Nor do we see how respondent would be prejudiced by petitioner's failure to timely cure the defect. Indeed, because the petition indicated that the dispute concerned "the full amount of the Final Assessment, presumably $1,707,147.49, for withholding taxes, for 02/06-10/06, 12/06, 01/07-03/07, 06/07, and 8/07," and because respondent issued the assessments, it is reasonable to expect that respondent would have been able to determine the assessment numbers corresponding to the identified periods. Thus, the degree of noncompliance and lack of resulting prejudice does not warrant dismissal, see *Stevens v Bangor Twp*, 150 Mich App 756, 761; 389 NW2d 176 (1986) (concluding that the dismissal of a petition on the basis of the petitioner's counsel's failure to appear at a conference was an abuse of discretion), especially

MCR 7.215(C)(1), this Court may view them as persuasive, *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2004).

where there is no evidence on the record that petitioner was in possession of the assessment numbers. Accordingly, we conclude that the Tax Tribunal abused its discretion by dismissing the petition on the basis of the failure to provide the assessment numbers within 21 days.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

CITY OF PLYMOUTH v MCINTOSH

Docket No. 297614. Submitted December 9, 2010, at Detroit. Decided December 21, 2010, at 9:00 a.m.

Michael McIntosh was arrested by a city of Plymouth police officer, Kevin Chumney, and issued a citation for operating a motor vehicle while intoxicated, a misdemeanor. The citation included the language, "I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief," and Chumney signed it and filed it in the 35th District Court. Defendant waived the arraignment and asked the court, Michael J. Gerou, J., to enter a plea of not guilty. Defendant was convicted by a jury of the lesser misdemeanor of operating a vehicle while visibly impaired. He appealed in the Wayne Circuit Court, and the circuit court, Thomas E. Jackson, J., concluded that, after defendant pleaded, the prosecutor was required by MCL 764.9g to file a sworn complaint with the court before proceeding with prosecution. Because this was not done, the circuit court vacated defendant's conviction. The city of Plymouth appealed.

The Court of Appeals *held*:

1. MCL 764.9g unequivocally provides that in order for the prosecution of a misdemeanor to continue after a defendant pleads not guilty, a sworn complaint must be filed. There is no requirement that the sworn complaint be filed after the plea is made, only that it is filed some time before additional proceedings take place after the plea.

2. Under both the Michigan Vehicle Code and the Code of Criminal Procedure, when a citation is issued for a civil infraction, misdemeanor, or ordinance violation for which the maximum permissible penalty does not exceed 93 days in jail or a fine, or both, that was committed in the presence of an officer who signs the citation, the citation is treated as made under oath if it includes the language, "I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief." Because the citation issued to defendant was signed by the officer who had witnessed the violation and included the required language, a sworn complaint was filed at the time the citation was filed and there was no need for a second

sworn complaint to be filed before proceedings could continue after defendant's plea of not guilty. The circuit court erred in vacating defendant's conviction.

Reversed and remanded.

PRETRIAL PROCEDURE — MISDEMEANOR PROSECUTIONS — NOT-GUILTY PLEAS — SWORN COMPLAINTS.

Under MCL 764.9g, in order for the prosecution of a misdemeanor to continue after a defendant pleads not guilty, a sworn complaint must be filed; there is no requirement that the sworn complaint be filed after the plea is made, only that it is filed some time before additional proceedings take place after the plea.

Miller & Bartnicki, P.C. (by *Cameron A. Miller* and *Michael P. Bartnicki*), for the city of Plymouth.

Lawrence J. Coogan for Michael McIntosh.

Amici curiae:

Hemming, Polaczyk, Cronin, Smith, Witthoff & Bennett, P.C. (by *Kevin L. Bennett*), for Canton Charter Township.

Garan Lucow Miller, P.C. (by *Rosalind Rochkind*) for the Michigan Municipal League and the Michigan Townships Association.

Before: SHAPIRO, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM. The prosecutor appeals by leave granted an order vacating defendant's conviction for operating a motor vehicle while visibly impaired, MCL 257.625(3). We reverse.

Defendant was arrested for a violation of MCL 257.625(1), operating a motor vehicle while intoxicated. Pursuant to MCL 257.625(9)(a), a first offense was "a misdemeanor punishable by 1 or more of the following: (*i*) Community service for not more than 360 hours. (*ii*) Imprisonment for not more than 93 days . . . . (*iii*) A fine

of not less than $100.00 or more than $500.00 . . . ." It is undisputed that Officer Kevin Chumney, a police officer for the city, issued a citation[1] for this offense, which was then filed with the district court. The citation included the language, "I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief." In addition, this citation provided that defendant was to appear on or before February 12, 2009. According to the district court opinion below, defendant was initially held pursuant to MCL 780.581(3) until he was in a proper condition to be released and, apparently in lieu of an immediate arraignment, see MCL 257.727 and MCL 257.625b(1), was released after posting bond. See MCL 780.581(2). While the district court opinion indicated that defendant was subsequently arraigned, we note that in a letter to the court dated February 4, 2009, defendant's attorney specifically waived defendant's arraignment, asked the court to enter a plea of not guilty on defendant's behalf, and asked that the matter be set for a pretrial conference.[2] Defendant was subsequently convicted by jury of the lesser offense of operating a vehicle while visibly impaired, MCL 257.625(3).

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[1] Officer Chumney utilized the "Uniform Law Citation" form citation in the instant case. As will be discussed below, the Code of Criminal Procedure, including MCL 764.9g, which is at issue in the instant case, refers to citations as "complaints" or "appearance tickets," see MCL 764.9f, while the Michigan Vehicle Code refers to them as "complaints" or "citations to appear," see MCL 257.728(1). Based on our reading of these provisions and the discussion by the State Court Administrative Office, which uses these terms interchangeably to discuss the Uniform Law Citation, we conclude that these provisions all discuss what is, in effect, a written notice to appear given to a misdemeanor defendant (by an officer or other official) in lieu of a more immediate presentation of the defendant to a magistrate.

[2] The district court's register of actions, while containing an "arraignment date" of February 4, 2009, also notes that defendant's attorney waived the arraignment on that date.

On appeal to the circuit court, that court held that after defendant pleaded not guilty, the prosecutor was required to file a sworn complaint with the court before the prosecution could proceed. Since it was undisputed that this procedure was not followed, the circuit court ruled that defendant's conviction must be vacated. The circuit court reached this conclusion based on its reading of MCL 764.9g, which provides:

> (1) When under the provisions of sections 9b or 9c an officer issues *an appearance ticket*, an examining magistrate may accept a plea of guilty or not guilty *upon the appearance ticket, without the necessity of a sworn complaint*. *If the offender pleads not guilty, no further proceedings may be had until a sworn complaint is filed with the magistrate. A warrant for arrest shall not issue for an offense charged in the appearance ticket until a sworn complaint is filed with the magistrate*.
>
> (2) *A district court magistrate may accept a plea of guilty upon an appearance ticket, without the necessity of a sworn complaint*, for those offenses within his jurisdiction as prescribed by section 8511 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.8511 of the Compiled Laws of 1948. [Emphasis added.][3]

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[3] Similarly, the Michigan Vehicle Code provides in MCL 257.728e:

> When under section 728 an officer issues a citation for a misdemeanor punishable by imprisonment for not more than 90 days, a magistrate may accept a plea of guilty or not guilty upon the citation, without the necessity of a sworn complaint but the officer shall sign the complaint before the magistrate makes a docket return on the complaint. If the offender pleads not guilty, further proceedings may not be had until a sworn complaint is filed with the magistrate. A warrant for arrest shall not issue for an offense under this act until a sworn complaint is filed with the magistrate.

While the first portion of this provision is not directly applicable to the facts in the instant case where the crime charged was a 93-day misdemeanor and defendant did not plead guilty, the language relied upon by the circuit court is identical, i.e., that once a defendant pleads not guilty

The prosecutor appeals this dismissal and argues that, contrary to the decision of the circuit court, if a citation constituting a sworn complaint has already been filed with the court, then neither the Michigan Vehicle Code nor the Code of Criminal Procedure requires an additional sworn complaint to be filed with the magistrate after a plea of not guilty in certain misdemeanor cases. The prosecutor further argues that the district court correctly held that this procedure is also proper under MCR 6.615. We agree.

"We review de novo issues of constitutional and statutory interpretation, as well as all other questions of law." *People v Gayheart*, 285 Mich App 202, 207; 776 NW2d 330 (2009). Likewise, "[i]nterpretation of a court rule is a question of law that this Court reviews de novo." *People v Buie*, 285 Mich App 401, 416; 775 NW2d 817 (2009) (quotation marks and citation omitted). The principles of statutory interpretation apply to the interpretation of court rules. *People v Caban*, 275 Mich App 419, 422; 738 NW2d 297 (2007).

MCL 764.9g unequivocally provides that in order for a prosecution to continue after a plea of not guilty, a sworn complaint must be filed. However, the statute does not indicate that the sworn complaint must come *after* that plea. Defendant suggests that this temporal requirement is the only way to make sense of the provision. However, defendant ignores the fact that the prosecution may, but is not required to, file a sworn complaint before the plea. If the prosecution does not, then MCL 764.9g requires that a sworn complaint then be filed before further proceedings. On the other hand, in those cases where the prosecution files a sworn complaint before the arraignment,

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the proceedings must be stopped until a "sworn complaint" is filed with the magistrate and a warrant is issued.

MCL 764.9g is satisfied and there is no requirement that a second sworn complaint be filed.

The same is true as to defendant's reliance on MCL 257.728e. This provision requires that a sworn complaint must be filed prior to further proceedings after a plea of not guilty. However, it does not mandate that the sworn complaint be filed after the plea. The only requirement is that the sworn complaint be filed at some time before those additional proceedings take place. There is nothing in the statute that requires a second sworn complaint.

It is clear that related statutes, as well as the applicable court rule, provide for citations that constitute a "sworn complaint" and for citations that are not sworn. MCL 257.727c, which addresses citations under the Michigan Vehicle Code, provides:

> (1) As used in this act, *"citation" means a complaint* or notice upon which a police officer shall record an occurrence involving 1 or more vehicle law violations by the person cited. Each citation shall be numbered consecutively, be in a form as determined by the secretary of state, the attorney general, the state court administrator, and the director of the department of state police and shall consist of the following parts:
>
> (a) *The original which shall be a complaint or notice to appear by the officer and shall be filed with the court in which the appearance is to be made*.
>
> (b) The first copy which shall be retained by the local traffic enforcement agency.
>
> (c) The second copy which shall be delivered to the alleged violator if the violation is a misdemeanor.
>
> (d) The third copy which shall be delivered to the alleged violator if the violation is a civil infraction.
>
> (2) With the prior approval of the state officials enumerated in subsection (1), the citation may be appropriately modified as to content or number of copies to accommodate

> law enforcement and local court procedures and practices. Use of this citation for other than moving violations is optional.
>
> (3) *For purposes of this act, a complaint signed by a police officer shall be treated as made under oath if the violation alleged in the complaint is either a civil infraction or a misdemeanor or ordinance violation for which the maximum permissible penalty does not exceed 93 days in jail or a fine, or both, and occurred or was committed in the signing officer's presence or under circumstances permitting the officer's issuance of a citation under section 625a or 728(8), and if the complaint contains the following statement immediately above the date and signature of the officer:*
>
> *"I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief."* [Emphasis added.]

The statute clearly provides that a signed citation is a complaint and that, where the violation is punishable by no more than 93 days in jail and was committed in the officer's presence, the signed citation constitutes a "sworn complaint" if the citation form contains the signed declaration set forth in subsection (3) above. In this case, the offense occurred in Officer Chumney's presence, and the citation, which was filed with the district court, contained the phrase required by subsection (3) above. Therefore, the citation constituted a sworn complaint pursuant to this section.

The citation in the instant case also constitutes a sworn complaint under the applicable provision in the Code of Criminal Procedure. MCL 764.1e(1) states the following regarding complaints:

> For purposes of sections 1a to 1d of this chapter, a complaint signed by a peace officer shall be treated as made under oath if the offense alleged in the complaint is a misdemeanor or ordinance violation for which the maximum permissible penalty does not exceed 93 days in jail or

> a fine, or both, that was committed in the signing officer's presence or that was committed under circumstances permitting the officer's issuance of a citation under section 625a[4] or 728(8) of the Michigan vehicle code, 1949 PA 300, MCL 257.625a and 257.728, and if the complaint contains the following statement immediately above the date and signature of the officer:
>
> "I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief." [Emphasis added.]

Therefore, under both of these provisions, the citation issued to defendant constitutes a sworn complaint.

We note the following instructive discussion concerning the rationale behind the use of the "appearance ticket" and the fact that under certain circumstances, a police officer's signed citation substitutes as a sworn complaint:

> In contrast with those arrested for felonies, a person arrested for a minor offense need not be taken immediately before a magistrate,[5] and a complaint need not be immediately presented to a magistrate. *Cf.* MCL 764.9c; MSA 28.868(3), with MCL 764.13; MSA 28.871(1). Public ser-

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[4] MCL 257.625a provides in pertinent part:

> (1) A peace officer may arrest a person without a warrant under either of the following circumstances:
>
> (a) The peace officer has reasonable cause to believe the person was, at the time of an accident in this state, the operator of a vehicle involved in the accident and was operating the vehicle in violation of section 625 or a local ordinance substantially corresponding to section 625.

[5] As noted in other portions of this opinion, this does not strictly apply in the instant case because defendant was arrested for a violation of MCL 257.625(1). See MCL 257.727. However, the points made in the discussion are equally applicable, i.e., (1) appearance tickets or "citations to appear" are issued to certain misdemeanor offenders in lieu of taking the offender into custody, (2) a magistrate need not have a sworn complaint in front of him or her in order to receive a plea of guilty or not guilty to certain

vants other than peace officers can be authorized to serve appearance tickets[6] for certain offenses of less than felony grade. MCL 764.9c; MSA 28.868(3). An examining magistrate can accept a plea of guilty or not guilty for certain minor offenses for which an appearance ticket has been issued without the necessity of a sworn complaint. MCL 764.9g; MSA 28.868(7). Finally, while most complaints must be sworn to before a magistrate or clerk, MCL 764.1a; MSA 28.860(1), for certain minor offenses the complaint is simply treated as having been made under oath if it contains a declaration that the statements are true upon information and belief above the date and signature of a peace officer. MCL 764.1e; MSA 28.860(5). [*People v Smith*, 423 Mich 427, 443 n 1; 378 NW2d 384 (1985) (opinion by WILLIAMS, C.J.).]

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offenses, and (3) a police officer's citation can serve as a sworn complaint if it meets the requirements of MCL 764.1e(1) or MCL 257.727c(3).

[6] An appearance ticket is defined in MCL 764.9f, which provides:

> (1) . . . "[A]ppearance ticket" means *a complaint or written notice issued and subscribed by a police officer* or other public servant authorized by law or ordinance to issue it directing a designated person to appear in a designated local criminal court at a designated future time in connection with his or her alleged commission of a designated violation or violations of state law or local ordinance for which the maximum permissible penalty does not exceed 93 days in jail or a fine, or both. The appearance tickets shall be numbered consecutively, be in a form required by the attorney general, the state court administrator, and the director of the department of state police, and consist of the following parts:
>
> (a) *The original which shall be a complaint or notice to appear by the officer and filed with the court*.
>
> (b) The first copy which shall be the abstract of court record.
>
> (c) The second copy which shall be retained by the local enforcement agency.
>
> (d) The third copy which shall be delivered to the alleged violator.
>
> (2) With the prior approval of the state officials listed in subsection (1), an appearance ticket may be appropriately modified as to content or number of copies to accommodate law enforcement and local court procedures and practices.

Similar provisions apply under the Michigan Vehicle Code; i.e., an individual who commits a misdemeanor under the code and who is subject to a warrantless arrest can either be detained and arraigned, or issued a "citation to appear"; and the magistrate can, for certain offenses, accept a plea of guilty or not guilty without the necessity of a sworn complaint. See MCL 257.727; MCL 257.728; MCL 257.728e. And as noted above, under MCL 257.727c(3), a citation can constitute a sworn complaint if it meets the conditions stated in that subsection.

This statutory scheme is consistent with the relevant court rule. MCR 6.615, which governs the initiation of misdemeanor traffic cases, provides for the use of a citation as a sworn complaint. Specifically, the rule provides in pertinent part:

> (A) Citation; Complaint; Summons; Warrant.
>
> (1) A misdemeanor traffic case may be begun by one of the following procedures:
>
> (a) Service by a law enforcement officer on the defendant of a written citation, and the filing of the citation in the district court.
>
> (b) The filing of a sworn complaint in the district court and the issuance of an arrest warrant. *A citation may serve as the sworn complaint* and as the basis for a misdemeanor warrant.
>
> (c) Other special procedures authorized by statute.
>
> (2) The citation serves as a summons to command
>
> (a) the initial appearance of the defendant; and
>
> (b) a response from the defendant as to the defendant's guilt of the violation alleged.
>
> * * *
>
> (D) Contested Cases.

> (1) A contested case may not be heard until a citation is filed with the court. If the citation is filed electronically, the court may decline to hear the matter until the citation is signed by the officer or official who issued it, and is filed on paper. A citation that is not signed and filed on paper, when required by the court, may be dismissed with prejudice.
>
> (2) A misdemeanor traffic case must be conducted in compliance with the constitutional and statutory procedures and safeguards applicable to misdemeanors cognizable by the district court.

Thus, not all appearance tickets or citations are considered sworn complaints under the Michigan Vehicle Code or the Code of Criminal Procedure, and not every appearance before the magistrate necessarily is preceded by the issuance of a complaint. This procedure, similar to that found in MCR 6.615, is designed to ensure that, following a plea of not guilty, until the magistrate has in front of him or her either a sworn complaint or a citation that takes the place of a sworn complaint, further proceedings do not occur. It is not, as defendant suggests, designed to require that the officer file a second form to essentially restate identical facts before the proceedings can continue.

We find further support for our conclusion in a memorandum from the State Court Administrative Office, dated June 13, 2003, which approves the Uniform Law Citation for use as a citation and appearance ticket and advises that the citation serves as the complaint. The memorandum specifically states:

> The Uniform Law Citation is the formal sworn complaint as is Form DC 225.[7] Courts may require prosecutorial review of the citation or the filing of a "formal"

[7] The Uniform Law Citation is the civil infraction or misdemeanor appearance citation, which was used in the instant case and signed by Officer Chumney. Form DC 225 is the separate misdemeanor complaint and warrant.

> complaint on Form DC 225 as a matter of preference for purposes of ensuring that the complaint has been reviewed by an attorney. This is not a requirement of the statute. MCL 764.9g authorizes the process from filing to hearing on the citation alone and was not intended to require the filing of DC 225 before the court. MCL 764.9g was intended to allow for the option of proceeding on either the appearance ticket (Uniform Law Citation) or DC 225 depending on the preference of the local jurisdiction. The primary point of MCL 764.9g is to ensure that the court does not proceed until either the citation or other sworn complaint has **actually been filed**, since there are instances in which the defendant may appear in court before the citation has been filed.

We agree, and note that while an administrative agency's interpretation of a statute it is charged with executing is not binding on this Court, we find it persuasive in this case and not contrary to the plain meaning of the statutes at issue. *Chelsea Inv Group LLC v City of Chelsea*, 288 Mich App 239, 260; 792 NW2d 781 (2010).

Here, defendant was arrested, detained, and would have been arraigned had he not waived his arraignment. Instead, he was released on bond and, similarly to the circumstances concerning other misdemeanors for which a citation to appear is generally given, Officer Chumney's citation was filed with the court. This citation was in the form of the Uniform Law Citation, and contained the language, "I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief." Under MCL 257.727c, MCL 764.1e, and MCR 6.615, this citation served as the sworn complaint. Thus, the circuit court erred in its finding that a second sworn complaint had to be issued prior to continuation of the case following the entry of defendant's plea of not guilty.

Finally, although the circuit court did not reach the issue, we also reject defendant's claim below that this procedure somehow deprived defendant of due process. While defendant appears to maintain that a warrant was necessary in the instant case, we concur with the district court that, because the function of a warrant in a criminal case is to enable the court to acquire jurisdiction over the defendant, and since defendant in the instant case voluntarily subjected himself to the district court's jurisdiction through his attorney's waiver of the arraignment and request for entry of a plea of not guilty, there was no necessity to issue another warrant. See *People v Burrill*, 391 Mich 124, 131; 214 NW2d 823 (1974); *Detroit v Recorder's Court Judge*, 85 Mich App 284, 290-291; 271 NW2d 202 (1978). As to defendant's arguments concerning the determination of reasonable cause by a magistrate, defendant cannot be heard to complain here when he decided to waive his arraignment and move to the pretrial phase of the proceedings. Our Supreme Court has held that the right to an arraignment is a procedural right that can be waived by defendant through his counsel. *People v Phillips*, 383 Mich 464, 470; 175 NW2d 740 (1970). "A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal." *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

Reversed and remanded for reinstatement of defendant's conviction. We do not retain jurisdiction.

JOHNSON v DETROIT MEDICAL CENTER

Docket No. 293304. Submitted December 14, 2010, at Detroit. Decided December 21, 2010, at 9:05 a.m.

Yolanda Johnson filed a medical malpractice suit in the Wayne Circuit Court against Detroit Medical Center and other health-care providers, including Andre R. Nunn, M.D., a surgeon. Plaintiff moved to compel the disclosure of Nunn's credentials and privileges file and also his operative logs. The court, Daphne Means Curtis, J., granted the motion and ordered the disclosure. Defendants applied for leave to appeal, but the Court of Appeals denied the application. The Supreme Court, in lieu of granting defendants' application for leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 485 Mich 870 (2009).

The Court of Appeals *held*:

1. Under MCL 333.21515, records, data, and knowledge collected by a peer review committee are confidential and may only be used for the purposes of a peer review committee to reduce morbidity and mortality and to ensure quality of care. The trial court erred to the extent that it required defendants to disclose the contents of Nunn's credentials and privileges file.

2. Under MCL 600.2157, a physician may not disclose any information acquired by the physician in attending a patient if the information was necessary for the treatment or the prescription of treatment of the patient. This privilege belongs to the patient, and only the patient may waive it. The operative logs sought by plaintiff were the type of information protected by the statute. Defendants' failure to timely raise the issue did not constitute waiver of the privilege by a patient, and thus the trial court erred when it ordered defendants to disclose Nunn's operative logs.

Reversed.

1. PRETRIAL PROCEDURE — DISCOVERY — CONFIDENTIAL INFORMATION — PEER-REVIEW PRIVILEGE.

Records, data, and knowledge collected by a peer review committee are confidential and may only be used for the purposes of a peer

review committee to reduce morbidity and mortality and to ensure quality of care (MCL 333.21515).

2. PRETRIAL PROCEDURE — DISCOVERY — CONFIDENTIAL INFORMATION — PHYSICIAN-PATIENT PRIVILEGE.

Under the physician-patient privilege, a physician may not disclose any information acquired by the physician in attending a patient if the information was necessary for the treatment or the prescription of treatment of the patient; this privilege belongs to the patient, and only the patient may waive it (MCL 600.2157).

Ishbia & Gagleard, PC (by *Michael A. Gagleard* and *Michelle M. Shaya*), for plaintiff.

Tanoury, Corbet, Shaw, Nauts & Essad, P.L.L.C. (by *Linda M. Garbarino*, *Anita Comorski*, and *David R. Nauts*), for defendants.

Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM. Defendants appeal the trial court's order granting plaintiff's motion to compel discovery and requiring defendants to produce allegedly protected or privileged peer review and nonparty patient documents. The case is before this Court pursuant to our Supreme Court's order, in lieu of granting leave to appeal, remanding the case to this Court "for consideration as on leave granted." *Johnson v Detroit Med Ctr*, 485 Mich 870 (2009). We reverse.

Defendants argue that the trial court erred by compelling disclosure of Dr. Andre Nunn's credentials and privileges file. We agree.

A trial court's ruling on a discovery motion is reviewed for an abuse of discretion. *Holman v Rasak*, 486 Mich 429, 436; 785 NW2d 98 (2010). However, whether production of requested documents is barred by statute

is a question of law that we review de novo. *Dye v St John Hosp & Med Ctr*, 230 Mich App 661, 665; 584 NW2d 747 (1998).

Article 17, part 215 of the Public Health Code, MCL 333.21501 *et seq*., governs the regulation of hospitals. A hospital's responsibilities and duties concerning its medical staff's credentials and privileges is addressed in MCL 333.21513, which provides, in pertinent part:

> The owner, operator, and governing body of a hospital licensed under this article:
>
> (a) Are responsible for all phases of the operation of the hospital, selection of the medical staff, and quality of care rendered in the hospital.
>
> (b) Shall cooperate with the department in the enforcement of this part, and *require that the physicians*, dentists, and other personnel *working in the hospital who are required to be licensed or registered are in fact currently licensed or registered*.
>
> (c) Shall assure that physicians and dentists admitted to practice in the hospital *are granted hospital privileges consistent with their individual training, experience, and other qualifications*.
>
> (d) Shall assure that physicians and dentists admitted to practice in the hospital are organized into a medical staff to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients. The review shall include the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital. [Emphasis added.]

MCL 333.21515 provides that the following collected materials are confidential: "The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes

provided in this article, shall not be public records, and shall not be available for court subpoena." The use of the word "shall" in the statute indicates that this provision is mandatory. Additionally, MCL 333.21521 provides that "[a] hospital *shall meet the minimum standards and rules authorized by this article* and shall endeavor to carry out practices that will further protect the public health and safety, prevent the spread of disease, alleviate pain and disability, and prevent premature death." (Emphasis added.)

Our Supreme Court has recognized that, under § 21513, "[h]ospitals are required to establish peer review committees whose purposes are to reduce morbidity and mortality and to ensure quality of care." See *Attorney General v Bruce*, 422 Mich 157, 169; 369 NW2d 826 (1985). "Included in their duties is the obligation to review the professional practices of licensees, granting staff privileges consistent with each licensee's qualifications." *Id*.; see, also, *Dye*, 230 Mich App at 664-665. Thus, a credentialing committee is a peer review committee.

Accordingly, in *Dye*, 230 Mich App at 668, this Court "reject[ed] plaintiff's conclusion that materials relating to the provision of staff privileges are outside the purview of the [peer review] statutes." The Court stated that § 21515 "protect[s] against disclosure of information relating to [the physician's] application for staff privileges at defendant hospital." *Id*. at 669. Thus, absent a statutory exception, which plaintiff does not allege exists in this case, "the materials gathered by the credentials committee . . . with respect to [the physician's] qualifications and the extension of staff privileges" are confidential. *Id*. at 668-669.

We conclude that § 21515 clearly and unambiguously prohibits discovery of Dr. Nunn's credentials and privi-

leges file. *Attorney General*, 422 Mich at 173. "To hold otherwise would require us to create an exception to the [evidentiary] privilege granted such information by the Legislature; that is not for us to do." *Id*. Therefore, the trial court erred to the extent that it required defendants to disclose the contents of Dr. Nunn's credentials and privileges file.[1]

Defendants also argue that Dr. Nunn's operative logs are protected by the physician-patient privilege and, therefore, the trial court erred by ordering defendants to disclose them. We agree.

MCL 600.2157 provides, in pertinent part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery *shall not disclose* any information that the person has acquired in attending a patient in a professional character, *if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon*. [Emphasis added.]

The physician-patient privilege protects the identity of nonparty patients regardless of need. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 39; 594 NW2d 455 (1999). The privilege prohibits the disclosure of " 'any information' acquired under the requisite circumstances," even if the patient's identity is redacted. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 475; 608 NW2d 823 (2000). The statute is clear and unambiguous, and no further construction is necessary or permitted. *Id*. Further, "[t]he privilege belongs to the patient and can be waived only by the patient." *Id*. at 470 (quotation marks and citation omitted). Therefore,

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[1] Because everything within the file is protected, there is no merit to plaintiff's argument that defendants should be required to prepare a list of the file's contents so that items can be evaluated individually.

defendants' alleged failure to timely raise this issue does not waive the privilege.

The operative logs at issue in this case contain information acquired by Dr. Nunn in attending to patients in his professional capacity as a surgeon, i.e., the dates and types of surgeries performed. Further, the type of surgeries performed, as well as the time and the dates of the surgeries, are information necessary to attend and evaluate a patient's condition, progress, and recovery after the procedure. Therefore, we conclude that the information contained in Dr. Nunn's operative logs was gathered under the circumstances identified in the statute and, therefore, it is protected by the physician-patient privilege. Accordingly, the trial court erred in ordering defendants to disclose Dr. Nunn's operative logs.

Reversed.

PEOPLE v HARVERSON

Docket No. 293014. Submitted December 7, 2010, at Grand Rapids. Decided December 28, 2010, at 9:00 a.m.

Terell D. Harverson was convicted of unarmed robbery by a jury in the Kent Circuit Court. He was sentenced by the court, Paul J. Sullivan, J., to 3 to 15 years in prison. Defendant appealed, alleging that the evidence was insufficient to support his conviction and that, in determining the appropriate sentence, the court erred in scoring four offense variables (OVs).

The Court of Appeals *held*:

1. The de novo standard of review is the proper standard to employ in reviewing defendants' challenges that the evidence was insufficient to support their convictions. Reviewing an issue de novo means that the reviewing court addresses a legal issue anew, without any deference to the trial court's conclusion on the issue.

2. A defendant, to be guilty of unarmed robbery, must have feloniously taken the property of another, by force, violence, assault, or putting in fear, and while being unarmed. Unarmed robbery is a specific intent crime that requires the prosecution to establish that the defendant intended to permanently deprive the owner of the property. To permanently deprive, in the context of unarmed robbery, does not require, in a literal sense, that a defendant have an intent to permanently deprive the owner of the property; rather, it includes the retention of property without such retention being for the purpose of returning it within a reasonable time or the retention of property with the intent to return it only if the owner pays some compensation for its return. It is clear from defendant's rendition of the events that he possessed the requisite intent. Sufficient evidence existed to satisfy all the elements of the offense. The prosecution met its burden of proving the elements of unarmed robbery beyond a reasonable doubt.

3. OV 13, MCL 777.43, is scored for a continuing pattern of criminal behavior. Under OV 13, 10 points are appropriate if the offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property. Criminal activity, not a criminal conviction, is required for such purposes. A juvenile adjudication clearly constitutes

"criminal activity." Defendant's juvenile adjudications, which included receiving and concealing a stolen vehicle, unlawfully driving away an automobile, breaking and entering, fourth-degree criminal sexual conduct, and failure to register as a sex offender, supported the trial court's scoring of 10 points for OV 13.

4. Ten points are properly scored for OV 9, MCL 777.39, if 2 to 9 victims were placed in danger of physical injury or death. The trial court properly scored 10 points for OV 9 because defendant pointed a gun at the victim and two other individuals present at the scene of the robbery.

5. Fifteen points are properly scored for OV 1, MCL 777.31, when a firearm was pointed at or toward a victim. Five points are properly scored for OV 2, MCL 777.32, when the offender possessed a pistol, rifle, or shotgun. The trial court did not err by scoring 15 points for OV 1 and 5 points for OV 2 because the evidence showed that defendant pointed a gun at the victim during the robbery.

Affirmed.

1. CONSTITUTIONAL LAW — CRIMINAL LAW — SUFFICIENCY OF THE EVIDENCE — REVIEW DE NOVO.

The de novo standard of review is properly employed in reviewing a defendant's challenge to the sufficiency of the evidence to support the defendant's conviction; reviewing an issue de novo requires the reviewing court to address a legal issue anew, without deference to the trial court's conclusion on the issue.

2. ROBBERY — UNARMED ROBBERY — WORDS AND PHRASES — TO PERMANENTLY DEPRIVE THE OWNER OF PROPERTY.

Unarmed robbery is a specific intent crime for which the prosecution must establish that the defendant intended to permanently deprive the owner of property; to permanently deprive in the context of unarmed robbery does not require, in a literal sense, that the defendant have an intent to permanently deprive the owner of property, rather, the intent to permanently deprive includes the retention of property without such retention being for the purpose of returning the property within a reasonable time or the retention of property with the intent to return the property only if the owner pays some compensation for its return (MCL 750.530).

3. SENTENCES — OFFENSE VARIABLES — OFFENSE VARIABLE 13 — CRIMINAL ACTIVITY — JUVENILE ADJUDICATIONS.

Ten points must be scored under offense variable 13, regarding a continuing pattern of criminal behavior, if the defendant's offense

was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property; an appropriate juvenile adjudication constitutes criminal activity, a criminal conviction is not required (MCL 777.43[1][d]).

4. SENTENCES — OFFENSE VARIABLES — OFFENSE VARIABLE 9.

Scoring offense variable 9 for multiple victims may be appropriate, although the defendant may have robbed only one victim, when there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life during the robbery (MCL 777.39).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Chief Appellate Attorney, for the people.

Joseph L. Stewart for defendant.

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

MURRAY, P.J. Defendant appeals as of right his jury trial conviction of unarmed robbery, MCL 750.530. For this conviction, defendant was sentenced to 3 to 15 years' imprisonment. We affirm.

I. BACKGROUND

The events in this case were set in motion on March 14, 2008, when Kenneth Conliffe accepted a United Parcel Service (UPS) shipment of a cell phone for Kiara Anderson, his sister's roommate and defendant's girlfriend, at the women's apartment. Under the impression that Anderson was involved in stealing the phone of his sister's boyfriend, Conliffe explained that after accepting the phone, he threw it in a stream as a means of retaliation. Shortly thereafter, Conliffe received a ride home from his mother and stepfather.

Upon Conliffe's arrival home, he was accosted in his driveway by defendant, Anderson, and Jovanta Jackson. According to Conliffe's mother and stepfather, defendant accused Conliffe of stealing a cell phone and then removed Conliffe's sunglasses at gunpoint before fleeing the scene with his compatriots. Both Conliffe and his mother added that before the assailants left, Jackson told Conliffe to "run his pockets."

Offering a variation on this version of events, Anderson claimed that after learning from UPS that Conliffe had accepted the cell-phone shipment, she, defendant, and Jackson went to Conliffe's house to scare Conliffe into returning her cell phone. Anderson elaborated that although Jackson pulled a gun during the altercation and later "passed it" to defendant, she did not recall either man pointing a gun at Conliffe. Similar to Anderson's assertions, defendant testified that he accompanied Anderson and Jackson in order to retrieve Anderson's phone and that it was Jackson who pulled the gun during the altercation. Notably, defendant admitted "snatching [Conliffe's] glasses," but claimed that he told Conliffe, "you get these back when we get the phone back." Defendant denied, however, that he had possession of the gun and instead explained that he refused Jackson's demand to "run [Conliffe's] pockets" when Jackson threatened Conliffe with the gun after defendant had taken the glasses.

Following their altercation with Conliffe, the assailants drove off, but were pulled over and arrested when police identified their car and license plate number from a dispatch call regarding an armed robbery. During the course of the arrest, police found Conliffe's glasses and ammunition inside the car. The gun was found the next day in the neighborhood where the assailants were pulled over. Defendant was subse-

quently tried on a charge of armed robbery, but convicted of the lesser offense previously stated. This appeal ensued.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

1. STANDARD OF REVIEW

Defendant first's assignment of error is that the evidence was insufficient to support his unarmed robbery conviction. Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005) (opinion by KELLY, J.). We do not consider whether any evidence existed that could support a conviction, but rather, we must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979). "[C]ircumstantial evidence and reasonable inferences arising from th[e] evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000) (citation omitted).

The prosecution does not challenge the foregoing, but nonetheless points out that this Court has cited our Supreme Court for the proposition that sufficiency of the evidence issues are subject to de novo review despite the fact that no Michigan Supreme Court case expressly cites that standard. See *People v Hawkins*, 245 Mich

App 439, 457; 628 NW2d 105 (2001). In making this argument, the prosecution seems to imply that traditional de novo review would require this Court to overturn a verdict simply because its view of the facts conflicts with the jury's determination. This, however, misapprehends our duty in these cases.

When our Court reviews an issue "de novo," it means that we are addressing a legal issue anew, without any deference to the trial court's conclusion. See, e.g., *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 511; 761 NW2d 234 (2008) (WHITBECK, J., dissenting); *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 218-219; 707 NW2d 353 (2005). Hence, when reviewing an argument that there was legally insufficient evidence to support a conviction, we do not defer to any decision made by the trial court, but instead employ our independent judicial views while employing the well-settled standards for deciding sufficiency issues. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002) (employing de novo review of sufficiency argument from a bench trial conviction). More than two decades ago the United States Court of Appeals for the District of Columbia Circuit accurately and succinctly stated this proposition:

> We have concluded that we do not defer to the district court, because we must make our own independent judgment regarding the sufficiency of evidence. In so doing, of course, we may consider and be influenced by the opinion of the expert trial judge who has lived with the case—just as we give weight to one another's views. This will be particularly so where the trial judge has set forth his reasons with specificity. Moreover, it is the burden of the Government, as it is always the appellant's burden, to show that the judgment appealed from was wrong. But ultimately, the decision whether or not the evidence was

> sufficient is a question of law and therefore entirely our own. [*United States v Singleton*, 226 US App DC 445, 446; 702 F2d 1182 (1983) (en banc).]

See, also, *United State v Kelley*, 461 F3d 817, 825 (CA 6, 2006).[1]

In light of this explanation, it is easy to see that in articulating the de novo standard of review our prior cases cited Supreme Court decisions that were reviewing the evidence in a de novo fashion, even though not specifically saying so. See, e.g., *Tombs*, 472 Mich at 459-461 (opinion by KELLY, J.); *Johnson*, 460 Mich at 732-733; *Wolfe*, 440 Mich at 516-528. Consequently, we hold that although not expressly articulated by our Supreme Court, the de novo standard of review is proper in reviewing defendants' challenges that the evidence was insufficient to support their convictions.

2. UNARMED ROBBERY

To be guilty of unarmed robbery, a defendant must (1) feloniously take the property of another, (2) by force or violence or assault or putting in fear, and (3) be unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994); MCL 750.530. Unarmed robbery is a specific intent crime for which the prosecution must establish that the defendant intended to permanently deprive the owner of property. *People v Dupie*, 395 Mich 483, 487; 236 NW2d 494 (1975); *People*

[1] Importantly, whether in federal or state court, it is a defendant's constitutional right to due process that is at stake in sufficiency cases. *Johnson*, 460 Mich at 723; *Clark v Kansas City Missouri Sch Dist*, 375 F3d 698, 701 (CA 8, 2004). And "state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights . . . ." *Wright v West*, 505 US 277, 287; 112 S Ct 2482; 120 L Ed 2d 225 (1992) (quotation marks and citation omitted).

v King, 210 Mich App 425, 428; 534 NW2d 534 (1995).[2] Because intent may be difficult to prove, only minimal circumstantial evidence is necessary to show a defendant entertained the requisite intent. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

In raising this issue, defendant challenges only the intent element of this offense, in essence arguing that because he walked away after taking the glasses and refused to steal any other items from Conliffe, the prosecution failed to establish that defendant intended to permanently deprive Conliffe of his property.[3] However, to permanently deprive in the context of unarmed robbery "does not require, in a literal sense, that a thief have an intent to *permanently* deprive the owner of the property." *People v Jones*, 98 Mich App 421, 425-426; 296 NW2d 268 (1980). Rather, the intent to permanently deprive includes the retention of property without the purpose to return it within a reasonable time or the retention of property with the intent to return the property on the condition that the owner pay some compensation for its return. *Id*.

It is clear from defendant's own rendition of events that he possessed the requisite intent. On this score, defendant explained that he accompanied Anderson and Jackson for the express purpose of retrieving Anderson's cell phone. When Conliffe subsequently denied having knowledge of Anderson's phone, defen-

[2] Although *King* refers to armed robbery, the intent element of that offense is identical to that required for unarmed robbery. *King*, 120 Mich App at 428; *Johnson*, 206 Mich App at 125-126.

[3] Ironically, despite challenging the intent element of unarmed robbery on these grounds, defendant concedes that he is guilty of larceny from a person, MCL 750.357—an offense requiring the intent to permanently deprive. *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005). Despite this inconsistency, we will address defendant's argument as presented.

dant "snatched" Conliffe's glasses and told him, "you get these back when we get the phone back." In other words, defendant intended to retain Conliffe's glasses and *only* return them on the condition that Conliffe pay compensation in the form of returning Anderson's phone. Such testimony easily satisfies the intent element of unarmed robbery.

Defendant argues that the testimony of Anderson and Conliffe's mother contained inconsistencies. However, it is for the jury to determine witness credibility and resolve inconsistencies of testimony. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). And in any event, defendant's explanation of his words to Conliffe is tantamount to an admission that he possessed the requisite intent.

Before moving on, we note that although not directly challenged by defendant, sufficient evidence existed to satisfy the other elements of the offense. Indeed, Conliffe's mother and stepfather positively identified defendant as the perpetrator who pointed the gun at Conliffe before taking the glasses. An inference of the use of fear or violence (and even that defendant was armed) is easily deducible from such testimony. Thus, the prosecution met its burden of proving the elements of unarmed robbery beyond a reasonable doubt.

B. SCORING OF OFFENSE VARIABLES

Next, defendant challenges the scoring of Offense Variables (OV) 13, 9, 1, and 2. This Court reviews de novo the application of the sentencing guidelines but reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will

be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Absent an error in the scoring or reliance on inaccurate information in determining the sentence, this Court must affirm a sentence within the applicable guidelines range. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). A trial court's sentence may be invalid if it is based on a misconception of the law or inaccurate information. MCL 769.34(10); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

1. OV 13

Defendant first claims the court erroneously scored 10 points for OV 13 by including his juvenile adjudications.[4] This argument is unsustainable, however, in view of the plain language of MCL 777.43. Under that statute, OV 13 is scored for a "continuing pattern of criminal behavior" for which 10 points are appropriate if the "offense was part of a pattern of felonious *criminal activity* involving a combination of 3 or more crimes against a person or property . . . ." MCL 777.43(1)(d) (emphasis supplied). Notably, the plain language of the statute does not require a criminal conviction to score 10 points, but only requires "criminal activity." A juvenile adjudication clearly constitutes criminal activity because "it amounts to a violation of a criminal statute, even though that violation is not resolved in a 'criminal proceeding.' " *People v Luckett*, 485 Mich 1076, 1076-1077 (2010) (YOUNG, J., concurring). Therefore, defendant's poor juvenile track record, rife with adjudications, supported the trial court's scoring of this variable.

[4] According to the presentence investigation report, defendant's juvenile adjudications included: receiving and concealing a stolen vehicle, unlawfully driving away an automobile, breaking and entering, fourth-degree criminal sexual conduct, and failure to register as a sex offender.

2. OV 9

Next, defendant asserts that because Conliffe was the only victim, his score for this OV should be zero points instead of 10 points. MCL 777.39 governs the scoring of OV 9 and provides in part that the trial court assess 10 points if "2 to 9 victims . . . were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). For purposes of scoring this variable, a court is to count each person who was placed in danger of physical injury or loss of life or property during the transaction giving rise to the particular offense as a victim. MCL 777.39(2)(a); *People v McGraw*, 484 Mich 120, 128; 771 NW2d 655 (2009).

The presentence investigation report reveals[5] that during the robbery, Conliffe's mother jumped between Conliffe and defendant while defendant was pointing the gun at Conliffe's face for fear that Conliffe or her grandson, who was nearby, could be shot. "[I]n a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life." *People v Sargent*, 481 Mich 346, 350 n 2; 750 NW2d 161 (2008). Pointing a gun at multiple individuals clearly places them in danger of injury or loss of life. The score of 10 points for OV 9 was appropriate.

3. OV 1 AND OV 2

Defendant challenges the scoring of OVs 1 and 2 on the grounds that he was not convicted of possessing or

[5] "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report . . . ." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

pointing a firearm toward the victim and because there was no evidence that any other offender was assigned points for the use of weapons in this case. A trial court scores 15 points for OV 1 when "[a] firearm was pointed at or toward a victim," MCL 777.31(1)(c), and five points for OV 2 when "[t]he offender possessed . . . a pistol, rifle, [or] shotgun," MCL 777.32(1)(d). As noted in the foregoing analysis, the presentence investigation report indicates that defendant pointed the gun at Conliffe's face and, additionally, Conliffe's mother and stepfather both testified at trial that defendant brandished a gun during the robbery. The trial court did not err in scoring these variables.

C. *BLAKELY* CHALLENGE

Before concluding, we note that defendant also raises a *Blakely* challenge,[6] claiming that *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006) (finding that Michigan's indeterminate sentencing scheme is unaffected by *Blakely*), was wrongly decided. However, as we are bound to follow Supreme Court precedent on this matter, we reject this claim outright. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

Affirmed.

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[6] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

PEOPLE v VAUGHN

Docket No. 292385. Submitted December 15, 2010, at Detroit. Decided December 28, 2010, at 9:05 a.m.

Joseph L. Vaughn was convicted of two counts of assault with intent to do great bodily harm less than murder, possession of a firearm by a felon, and possession of a firearm during the commission of a felony (felony-firearm), second-offense, after a jury trial in the Wayne Circuit Court. On the second day of trial, defendant moved to suppress a statement he made to police officers at his home shortly before his arrest, asserting it had been made during improper custodial interrogation. The court, Prentis Edwards, J., denied the motion. Defendant appealed.

The Court of Appeals *held*:

1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of the warnings set forth in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). However, a police officer is only required to give the warnings when a suspect is in custody. To determine whether a defendant was in custody at the time of the interrogation, courts must examine all of the circumstances surrounding the interrogation and determine whether a reasonable person would have felt at liberty to terminate the interrogation and leave. The trial court did not err when it determined that defendant was not in custody because the police officers questioned defendant in his own home after having been invited in by defendant's mother, the officers had not drawn weapons and were not wearing uniforms, they did not order defendant to leave the basement, they did not handcuff defendant, and defendant's mother was present when the officers questioned defendant.

2. Defendant was not deprived of his right to a public trial when the trial court closed the courtroom to the public during jury voir dire. A trial court may not close the courtroom to the public unless the party seeking closure advances an overriding interest that is likely to be prejudiced and the trial court considers all reasonable alternatives to closing the proceeding. However, the failure of the defendant to timely assert the right to a public trial

forecloses the later grant of relief. Because defendant's trial counsel did not object to the trial court's decision to close the courtroom to the public during the selection of his jury, defendant waived any objection to the decision.

3. Defendant was not denied the effective assistance of counsel. There was no showing that the two jurors that defendant argued should have been questioned further were biased against defendant, there was no basis to quash the information after a third preliminary hearing was held because additional evidence was presented then, alibi witnesses would not have changed the outcome of the trial because defendant had admitted that he had been outside when the shooting occurred, and defendant did not meet his burden of showing that defense counsel's failure to challenge the court's decision to close the courtroom to the public during voir dire was not sound trial strategy. Defendant failed to show that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Affirmed.

CONSTITUTIONAL LAW — RIGHT TO PUBLIC TRIAL — NECESSITY OF TIMELY OBJECTION.

A trial court may not close the courtroom to the public unless the party seeking closure advances an overriding interest that is likely to be prejudiced and the trial court considers all reasonable alternatives to closing the proceeding; however, the failure of the defendant to timely assert the right to a public trial forecloses the later grant of relief.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Thomas M. Chambers*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Randy E. Davidson*) for defendant.

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM. Defendant Joseph Lashawn Vaughn appeals as of right his jury convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second-offense, MCL 750.227b. The trial court sentenced defendant to serve 3½ to 10 years in prison for each of the assault convictions, to serve 2 to 5 years in prison for the felon-in-possession conviction, and to serve 5 years in prison for the felony-firearm conviction. On appeal,[1] defendant argues that the trial court erred when it denied his motion to suppress the statements that he made to police officers shortly after the incident at issue and erred when it closed the courtroom to the public during jury voir dire. He also argues that his trial counsel did not provide effective assistance and that his appeal has been prejudiced by a missing or incomplete record. These errors, he maintains, deprived him of a fair trial. We conclude that there were no errors that warrant relief. Accordingly, we affirm.

I. BASIC FACTS

This case arises from a shooting that occurred late at night in June 2002.[2] Emmitt Smith, who was a retired police officer, testified that he picked up his wife from work and arrived back at his home at about 11:45 p.m.

[1] Defendant filed three separate briefs on appeal. His appellate counsel filed a brief on appeal and later moved for permission to add an additional claim of error in a supplemental brief, which this Court granted. See *People v Vaughn*, unpublished order of the Court of Appeals, entered December 6, 2010 (Docket No. 292385). Defendant also filed a brief on his own behalf. See Administrative Order No. 2004-06, Standard 4.

[2] The jury convicted defendant in January 2003, but defendant absconded and the trial court was not able to sentence him until May 2009.

Sometime shortly thereafter, he saw a car parked in front of his home. The tail end of the car was blocking his driveway and there was a person crouched down in the passenger side with a hat over his or her head. Smith said he walked over to his neighbor's house and called to him through an open window.

Terrance Haynes testified that he was Smith's neighbor and that he was watching television at around midnight on the night at issue when Smith came over and beckoned to him through an open window. Haynes went out and spoke with Smith on the porch. Smith said he asked Haynes if he knew the people in the car, and he responded that he did not. Haynes said that he saw a person in the car's front passenger seat and that the person was hunched down. Haynes and Smith talked for a while about other things, and Smith said he wanted to "see what's going on" with the car. Smith then walked toward the car.

Smith said that he approached the car parked in front of his house while his neighbor walked toward his own car. Smith noticed that the person in the car was a woman, and he asked her if anything was wrong. He had a brief conversation with the woman and then turned to walk away. At this point, he saw a black man dressed in dark clothing—dark shorts and a dark shirt—emerge from a nearby alley with a revolver. He walked toward Smith and Haynes while holding his gun and stated, "[W]hat are you niggas doing by my mother-fucking car." Smith told Haynes to get down. The man with the revolver began to fire at Smith and Haynes, and Smith returned fire. Smith said the man fired two or three shots and ran into the street. He turned and fired at Smith after getting to the other side of the street, and Smith again fired back. The man continued to run away and disappeared down a driveway.

The woman got out of the car and disappeared around the end of the block. The police arrived just minutes later.

Michael Crosby testified that he was a police officer working on the night at issue with officers Lee Huelsenbeck and Christopher Staton. He received a call of shots fired at about 10 minutes after midnight that night and responded to the scene within 5 minutes. Crosby spoke with Smith at the scene and then ran a check on the plates on the car in front of Smith's house. The car belonged to defendant, and his address was just a few blocks away. Crosby said that he and his partners then went to defendant's house.

Huelsenbeck testified that defendant's mother answered the side door and, after he asked if defendant was home, she let them in. He said they came in onto a landing. The landing led up a few stairs to the kitchen, and there was also a flight of stairs that led to the basement. Huelsenbeck stated that defendant was at the bottom of the stairs "sweating profusely." Defendant was wearing blue shorts and a black shirt. Crosby said he asked defendant to come up. Defendant came up the stairs, and Crosby noticed that he was sweating heavily and was breathing hard. They went into the kitchen, and Crosby asked defendant where he had just come from. Defendant stated that "he was around the corner and someone tried to steal his car and shot at him several times." At that point Crosby arrested defendant.

II. MOTION TO SUPPRESS STATEMENTS

A. STANDARDS OF REVIEW

We first address defendant's argument that the trial court erred when it denied his motion to suppress the statement that he made to the police officers at his

home shortly after the shooting. Specifically, defendant argues that the trial court erred when it determined that he was not in custody when he made the statement and, accordingly, was not entitled to be advised of his constitutional rights, as required under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). This Court reviews for clear error the factual findings underlying a trial court's decision on a motion to suppress. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). However, this Court reviews de novo, as a question of law, whether the facts show that defendant was in custody and entitled to *Miranda* warnings. *Id.*

B. ANALYSIS

In *Miranda*, the Supreme Court of the United States determined that the coercive nature of custodial interrogations implicated a defendant's Fifth Amendment right to be free from compelled self-incrimination. See *Miranda*, 384 US at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."). In order to ensure that a defendant's statements were not the result of coercive interrogation techniques, the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. Accordingly, before conducting a custodial interrogation, the interrogating officer must advise the suspect of certain fundamental rights:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. [*Id.* at 479.]

"[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Id.* However, the Court limited the requirement to custodial interrogations—that is, interrogations that have a heightened risk of improper coercion. *Id.* at 444. Thus, a police officer is only required to give the warnings when a suspect is in custody. See *Stansbury v California*, 511 US 318, 322; 114 S Ct 1526; 128 L Ed 2d 293 (1994).

In assessing whether a defendant was in custody at the time of the interrogation, courts must examine " 'all of the circumstances surrounding the interrogation' and determine 'how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.' " *Yarborough v Alvarado*, 541 US 652, 663; 124 S Ct 2140; 158 L Ed 2d 938 (2004), quoting *Stansbury*, 511 US at 322, 325. A key question is whether, under the circumstances, a reasonable person would have felt at liberty to terminate the interrogation and leave—that is, was there a formal arrest or a restraint on freedom of movement of the degree associated with formal arrest. *Yarborough*, 541 US at 663.

Here, the trial court did not err when it determined that defendant was not in custody. The police officers went to defendant's house to investigate whether defendant had any involvement in the shooting. Although the officers entered defendant's home, they did so with defendant's mother's permission. Fur-

ther, there is no evidence that the police had their weapons drawn or were otherwise asserting control over the scene. Indeed, the officers were in plain clothes. When the police entered defendant's home, at least two of the officers saw defendant at the foot of the basement steps, and Crosby asked him to come up to the kitchen. There is no evidence that Crosby ordered defendant to come up or otherwise acted in a way that would give the impression that defendant was not free to disregard the request. The officers also questioned defendant in his own home rather than in a formal police setting. See *People v Coomer*, 245 Mich App 206, 220; 627 NW2d 612 (2001) (noting that an interrogation at a suspect's home is usually viewed as noncustodial). They did not handcuff defendant or otherwise restrict his movement. Finally, defendant's mother was present with him when the police officers questioned him. Under the totality of these circumstances, we cannot conclude that a reasonable person would not have felt at liberty to discontinue the interrogation and leave. *Yarborough*, 541 US at 663.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARDS OF REVIEW

Defendant also argues that his trial counsel was constitutionally ineffective. Specifically, he argues that his trial counsel should have challenged two jurors during voir dire, should have called two alibi witnesses, and should have moved to quash the information. Because there was no evidentiary hearing before the trial court, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. THE APPLICABLE LAW

To establish ineffective assistance of counsel, defendant must show that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). This Court presumes the effective assistance of counsel and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

C. THE FAILURE TO CHALLENGE JURORS

Defendant first argues that his trial counsel was ineffective for failing to challenge two jurors who expressed an interest in going home or at least for failing to question these jurors further. Toward the end of voir dire, defendant's trial counsel asked the potential jurors if they could all be fair. After this, he promised them that he had only one more question. Defendant's trial counsel then asked if any of them would like to go home:

> I've got some get out of jury service tickets in my pocket. I can get you out of here now. Tell me who don't want to be here. You don't need to have no reason for it. Doesn't have to be a good reason. You just don't feel like being here. Mr. Barnett, I want to go home. This is your shot. Serve or go home.
>
> Who wants to go home?

Four potential jurors raised their hands and indicated they would like to go home. After a recess, the prosecutor used a peremptory challenge to unseat one of the four jurors, and defendant's trial counsel used a

peremptory challenge to unseat another of the four. He did not seek to excuse the remaining two jurors. Defendant's trial counsel indicated that he was "satisfied with this jury, your Honor," and the jury was empanelled.

Defendant argues that his trial counsel's failure to remove, or at least question, the two other jurors could not be deemed a matter of trial strategy. Rather, seating the jurors, without first questioning whether they could be fair, resulted in a structural defect because they may have been biased and may have lacked the ability to judge fairly. Defendant cites several cases to support his position, but they are all distinguishable. In those cases, the prospective jurors expressed clear reservations about their ability to judge the defendant fairly. See *State v Chastain*, 285 Mont 61; 947 P2d 57 (1997), overruled by *State v Herrman*, 316 Mont 198; 70 P3d 738 (2003); *Hughes v United States*, 258 F3d 453 (CA 6, 2001); *Franklin v Anderson*, 434 F3d 412 (CA 6, 2006). Here, the prospective jurors simply revealed what many of their peers likely felt—that they would gladly be relieved of jury duty. Neither juror in this case indicated any potential prejudice or animus toward defendant.

In *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008), the defendant argued that counsel was ineffective for failing to challenge an allegedly biased potential juror who had admitted that he had discussed the defendant's case with others and had read various newspaper accounts of the case. However, further questioning revealed that the juror had not read anything that would influence his decision. He confirmed that he could " 'be fair and impartial to both sides.' " *Id.* This Court concluded that defendant's trial counsel was not ineffective:

> [D]efendant's trial counsel was not ineffective for failing to challenge the potential juror in question. Perhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions. However, as a reviewing court, we "cannot see the jurors or listen to their answers to voir dire questions." For this reason, this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror. [*Id.* at 258 (citations omitted).]

It is clear from the record in this case that neither juror expressed any bias or inability to judge the case fairly. And the fact that the jurors would rather not serve on the jury did not establish a ground for their dismissal. Absent a showing of actual bias against defendant, defense counsel's decision to keep the jurors was a matter of trial strategy, which we will not second-guess. *Id.*

D. FAILURE TO MOVE TO QUASH THE INFORMATION

Defendant argues that his counsel was also ineffective for failing to move to quash the information. A preliminary hearing was initially held in June 2002, at which time the trial court dismissed the case for lack of probable cause. A second preliminary hearing was adjourned at the prosecutor's request. Defendant was ultimately bound over after a third preliminary examination in September 2002. Defendant argues that there was no new evidence at the third scheduled hearing and that the prosecution was "judge shopping." A review of the record refutes this claim.

At the first preliminary hearing, only Smith testified. Because Smith failed to identify defendant as the shooter, the prosecutor admitted that the evidence was insufficient to bind defendant over for trial. However, at the September 2002 hearing, in addition to Smith, Huelsenbeck

testified about the circumstances surrounding the officers' investigation and defendant's arrest. Thus, contrary to defendant's contention, the prosecution presented new evidence at the final preliminary hearing, and that evidence established defendant as the man who shot at Smith and Haynes. It follows that defendant's trial counsel's decision not to move to quash the information on this basis did not fall below an objective standard of reasonableness under prevailing professional norms. *Yost*, 278 Mich App at 387.

E. FAILURE TO CALL ALIBI WITNESSES

Defendant also argues that counsel was ineffective for failing to investigate the case and call alibi witnesses. Defendant told counsel that his car had been stolen and that he was home when the offense took place. Defendant claims that both his mother and cousin were willing to testify to this effect, but counsel never contacted them.

Defendant has failed to establish the factual predicate for his claim by providing affidavits to substantiate that the witnesses would have testified as he claims. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The decision not to call alibi witnesses is generally a matter of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). And this Court will not second-guess that decision in the absence of any evidence that the witnesses would actually have testified as the defendant claims. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001) (noting that this Court will not substitute its judgment for that of trial counsel on matters of trial strategy, nor assess counsel's performance with the benefit of hindsight). Finally, even if defendant had presented evidence that the witnesses would have provided an alibi, defendant would still not be entitled to relief.

Crosby and Huelsenbeck arrived at the scene of the shooting a few minutes after it occurred and quickly determined that the car in front of Smith's house belonged to defendant. They proceeded to defendant's home and found him there, sweating profusely and breathing hard. After Crosby asked defendant where he had come from, he admitted that he came from just around the corner where someone had tried to steal his car and had shot at him. Given this evidence, even if defendant's trial counsel's decision not to call these witnesses fell below an objective standard of reasonableness under prevailing professional norms, it is not reasonably probable that the decision affected the outcome. *Yost*, 278 Mich App at 387. Thus, defendant is not entitled to any relief.

IV. RIGHT TO A PUBLIC TRIAL

A. STANDARDS OF REVIEW

Defendant next argues that the trial court erred when it closed the courtroom to the public during voir dire. Defendant contends that this error is structural error that automatically warrants a new trial. In the alternative, he maintains that his trial counsel's failure to object to the closing of the courtroom during voir dire constitutes ineffective assistance of counsel that warrants a new trial. This Court reviews de novo questions of constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008).

B. ANALYSIS

A defendant has the right to a public trial, which includes the right to have the courtroom open to the public during jury voir dire. See *Presley v Georgia*, 558 US ___; 130 S Ct 721, 724; 175 L Ed 2d 675 (2010).

Although there are exceptions to the right, the trial court may not close the courtroom to the public unless the party seeking closure advances an overriding interest that is likely to be prejudiced and the trial court considers all reasonable alternatives to closing the proceeding. *Id.* at 724. However, this right is not self-executing: the defendant must timely assert the right. *Levine v United States*, 362 US 610, 619-620; 80 S Ct 1038; 4 L Ed 2d 989 (1960) ("Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal."). Thus, the failure to timely assert the right to a public trial forecloses the later grant of relief. See *United States v Hitt*, 473 F3d 146, 155 (CA 5, 2006) ("Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial."); *Freytag v Comm'r of Internal Revenue*, 501 US 868, 896; 111 S Ct 2631; 115 L Ed 2d 764 (1991) (Scalia, J., concurring) (noting that review of a claim of error with regard to certain rights, such as the Sixth Amendment right to a public trial, may be foreclosed by the failure to timely assert the right); see also *Peretz v United States*, 501 US 923, 936-937; 111 S Ct 2661; 115 L Ed 2d 808 (1991) (noting that the failure to timely assert the right to have an Article III judge preside over jury voir dire forecloses the grant of relief).

Here, defendant's trial counsel did not object to the trial court's decision to close the courtroom to the public during the selection of his jury. Cf. *Presley*, 130 S Ct at 722 (noting that the defendant's trial counsel objected to the closing of the courtroom to the public).

Therefore, the error does not warrant relief. *Levine*, 362 US at 619; *Hitt*, 473 F3d at 155.

Likewise, we do not agree that defendant's trial counsel's failure to object to the closing of the courtroom constitutes ineffective assistance of counsel. In order to warrant relief premised on ineffective assistance of counsel, defendant must show that his trial counsel's decision not to object fell below an objective standard of reasonableness under prevailing professional norms and that, but for counsel's unprofessional conduct, the result of the proceedings would have been different. *Yost*, 278 Mich App at 387. Defendant's trial counsel might have reasonably concluded that proceeding with a jury voir dire that was closed to the public benefited defendant. Reasonable trial counsel might conclude that the potential jurors will be more forthcoming in their responses when the courtroom is closed, that the proceedings will be less likely to be tainted by outside influences, or might simply find the procedure preferable because it will expedite the proceedings. Defendant has failed to overcome the presumption that his trial counsel's decision was a matter of sound trial strategy. *LeBlanc*, 465 Mich at 578. Therefore, defendant is not entitled to relief.

V. MISSING RECORD

Finally, we address defendant's argument that he has been deprived of his right to an appeal because the lower court record is missing. He also notes that the register shows that his motion to suppress his statement was granted even though the statement was used at trial. As an alternative, defendant asked this Court to remand for a hearing to reconstruct the record. This Court granted the motion for a remand, see *People v Vaughn*, unpublished order of the Court of Appeals,

entered March 18, 2010 (Docket No. 292385), and the trial court reconstructed the relevant missing portion of the record and reconciled the discrepancy between the register and the actual events below. Moreover, the record otherwise appears sufficient to address defendant's claims of error. Therefore, he is entitled to no further relief. See *People v Audison*, 126 Mich App 829, 835; 338 NW2d 235 (1983) (noting that the defendant's right to an appeal is satisfied where the surviving record is sufficient to allow evaluation of the defendant's claims).

There were no errors warranting relief.

Affirmed.

PEOPLE v LAIDLER

Docket Nos. 294147 and 295111. Submitted November 10, 2010, at Detroit. Decided December 28, 2010, at 9:10 a.m.

Marteez D. Laidler was convicted of first-degree home invasion after a jury trial in the Wayne Circuit Court. Defendant and Dante Holmes had attempted to break into a home, but the home was occupied and the homeowner fatally shot Holmes. Defendant was originally sentenced to a prison term of 110 months to 20 years. After the court, Patricia Fresard, J., discovered that it had used an incorrect sentencing guidelines grid at defendant's original sentencing, defendant was resentenced to a lesser prison term of 48 months to 20 years. Defendant appealed both his conviction and his sentence.

The Court of Appeals *held*:

1. A prosecutor cannot vouch for the credibility of a witness, suggest that he or she has some special knowledge concerning a witness's truthfulness, or express a personal belief in the defendant's guilt. The record did not support defendant's claim that these rules were violated by the prosecutor during her closing argument, and because the prosecutor's argument was not improper, defense counsel was not ineffective for failing to object.

2. Offense variable 3 (OV 3), MCL 777.33, considers physical injury to a victim and requires that 100 points be assessed when a victim was killed; for purposes of OV 3, a victim is any person harmed by the criminal actions of the charged party. Under MCL 77.33(2)(b), 100 points are to be scored if death results from the commission of a crime and homicide is not the sentencing offense; this provision limits the offenses for which 100 points can be assessed to nonhomicide sentencing offenses in which the death resulted from the commission of a crime. Holmes was not a victim because he was not harmed by defendant's criminal activity or by the crime that was committed, jointly, by himself and defendant; rather, the victim of the crime was the homeowner, and he was not injured.

Affirmed, and remanded for resentencing.

O'CONNELL, P.J., concurred in affirming defendant's conviction but dissented from the majority's decision to vacate defendant's sentence. He would hold that any person harmed by the criminal

actions of the charged party, including a perpetrator, is a victim for whose death 100 points are to be scored under MCL 777.33(1)(a) or (b).

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 3 — PHYSICAL INJURY TO VICTIM — PERPETRATOR AS VICTIM.

Offense variable 3, physical injury to a victim, may only be scored when a person is harmed by the criminal actions of the charged party, not by the actions of another person present when the crime is committed (MCL 777.33).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Toni Odette*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Mark R. Hall*) for defendant.

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

BANDSTRA, J. In Docket No. 294147, defendant appeals as of right his conviction, following a jury trial, of first-degree home invasion. MCL 750.110a(2). Defendant was originally sentenced to a prison term of 110 months to 20 years. After the trial court discovered that it had used an incorrect sentencing guidelines grid at defendant's original sentencing, defendant was resentenced to a lesser prison term of 48 months to 20 years. Defendant appeals that sentence as of right in Docket No. 295111. Defendant's appeals have been consolidated for this Court's consideration. We affirm defendant's conviction, but remand for resentencing. These appeals have been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from an incident in which he and Dante Holmes broke into a house that

they apparently believed was unoccupied. The homeowner was present and fatally shot Holmes as he reached inside a broken window to unlock it. Defendant admitted that he was with Holmes at the house. The prosecution's theory at trial was that defendant assisted Holmes by helping him up to the window, which was six feet off the ground.

Defendant argues that he is entitled to a new trial because of the prosecutor's improper conduct during closing argument. Because defendant did not object to the prosecutor's comments at trial, relief is precluded unless defendant establishes plain error that affected his substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008); *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Defendant also contends that trial counsel was ineffective for failing to object to the prosecutor's conduct. Because defendant did not raise this issue below, review is limited to errors apparent from the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

The prosecutor cannot vouch for the credibility of a witness or suggest that she has some special knowledge concerning a witness's truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Nor may the prosecutor express a personal belief in the defendant's guilt. *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970). Contrary to defendant's assertion, however, the record does not support defendant's claim that these rules were violated by the prosecutor during her closing argument. Rather, the prosecution addressed the evidence presented at trial and the conclusions that reasonably could be drawn from it. *Bahoda*, 448 Mich at 282. Although the prosecuting attorney

noted that the jury had the option to find defendant not guilty, she argued that doing so would be contrary to what the facts showed and what the law required. There was nothing improper in arguing that the jury should convict defendant because the evidence showed that he was guilty. And because the prosecution's argument was not improper, defense counsel was not ineffective for failing to object. Counsel is not ineffective for failing to raise a meritless objection. *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004).

Defendant also argues that he is entitled to resentencing because the trial court erroneously scored 100 points for offense variable 3. The interpretation and application of the sentencing guidelines present questions of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Offense variable 3 (OV 3) considers "physical injury to a victim," MCL 777.33(1), and it assesses points depending on the degree of injury suffered by "a victim," MCL 777.33(1)(a) to (f). In relevant part, it requires that 100 points be assessed when "[a] victim was killed." MCL 777.33(1)(a) and (b). For purposes of OV 3, the term "victim" means "any person harmed by the criminal actions of the charged party." *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003).

MCL 777.33(2)(b) instructs further that 100 points are to be scored "if death results from the commission of a crime and homicide is not the sentencing offense." In this non-homicide sentencing offense case, the trial court determined that the death of defendant's co-felon, Holmes, justified a 100-point score for OV 3. It reasoned that "it doesn't have to be the victim" who was killed to warrant such a score and that 100 points could be assessed whenever "someone died as a result of the

commission of [the] crime," because subsection (2)(b) does not specifically refer to a victim. We disagree.

As already noted, MCL 777.33(1) authorizes the assessment of points only where a "victim" of the sentencing offense is killed or injured. Contrary to the reasoning of the trial court, subsection (2)(b) does not expand the applicability of this offense variable. Instead, it limits the offenses for which 100 points can be assessed. A 100-point score can only be imposed for non-homicide sentencing offenses where the death results from the commission of a crime. Neither of those limiting conditions can enlarge OV 3 so that it would authorize the imposition of points where there is no physical injury to a "victim" as required by subsection (1).

Here, Holmes simply was not a "victim" because he was not harmed by defendant's criminal activity, or by the crime that was committed, jointly, by defendant and Holmes. *Albers*, 258 Mich App at 593. Rather, the "victim" of the crime here was the homeowner, and he was not injured.[1] So, there being no "physical injury to a victim," here, OV 3 is simply inapplicable. MCL 777.33(1).[2]

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[1] In *Albers*, 258 Mich App at 580, defendant was convicted of involuntary manslaughter after her young son set fire to their apartment, resulting in the death of a child residing in another apartment in the same complex. The defendant challenged the assessment of 25 points under OV 3 for life-threatening or permanent injury to a second child resulting from that same fire. Our Court upheld the scoring, concluding that the other child was also a "victim" of the sentencing offense and explaining, as noted above, that a " 'victim' includes any person harmed by the criminal actions of the charged party." *Id.* at 591-593. Nothing in *Albers* supports the prosecutor's assertion here, adopted by the trial court, that under the circumstances presented in this case, defendant's co-felon is a "victim" within the meaning of OV 3. Nor has the prosecutor offered, or this Court found, any authority for such a proposition.

[2] We further note that the requirement of MCL 777.33(2)(b), that a death result from the commission of a crime, was not satisfied here. Even

Because the scoring error affects the appropriate guidelines range, resentencing is required. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006). Defendant's conviction is affirmed but his sentence is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

MURRAY, J., concurred.

O'CONNELL, P.J. (*concurring in part and dissenting in part*). I concur with the majority's decision to affirm defendant's conviction. I respectfully dissent, however, from the majority's decision to vacate defendant's sentence. In my view, the trial court properly assessed points under offense variable 3, MCL 777.33.[1] I would affirm defendant's sentence.

As the majority explains, defendant and Dante Holmes were breaking into a home when Holmes was shot and killed. Defendant was convicted of first-degree home invasion, MCL 750.110a(2). At sentencing, the trial court assigned 100 points against defendant under OV 3, MCL 777.33(1)(a). Defendant now argues that the OV 3 score was erroneous.

As the majority recognizes, subsection (1)(a) of OV 3 requires trial courts to assess 100 points if "a victim was killed." MCL 777.33(1)(a). Subsection (2)(b) defines the parameters of the 100-point assessment: "Score 100 points if death results from the commission of a crime

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if Holmes might properly be considered a "victim," his death resulted from the actions of the homeowner, not from the commission of a crime.

[1] The majority assumes that a co-perpetrator cannot be a crime victim under offense variable 3 (OV 3). I disagree. OV 3 plainly requires that perpetrators be accountable in sentencing when a death results from the commission of a crime. MCL 777.33(2)(b). If a perpetrator starts an action in motion and, as a result of the action, a co-perpetrator is killed, the co-perpetrator can be a "victim" within the meaning of OV 3.

and homicide is not the sentencing offense." The majority bases its holding on the term "victim" in subsection (1)(a), and concludes that subsection (2)(b) merely identifies the offenses that are subject to the 100-point assessment. This interpretation improperly curtails the terms of subsection (2)(b).

In *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003), this Court held that for purposes of OV 3, the term "victim" means "any person harmed by the criminal actions of the charged party." In the present case, defendant's criminal action was a home invasion; the home invasion resulted in Holmes's death. Because Holmes was harmed by defendant's criminal action, Holmes was a "victim" within the meaning of OV 3. By parceling out responsibility for the home invasion and then parceling out responsibility for the resulting shooting, the majority identifies the homeowner as the sole "victim" of the home invasion and relegates Holmes to being the "victim" of the shooting. I disagree with this logic. In my opinion, both the homeowner and Holmes are victims under OV 3.[2]

I would affirm both the conviction and the sentence of defendant.

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[2] The majority asserts, "Holmes simply was not a 'victim' because he was not harmed by defendant's criminal activity, or by the crime that was committed, jointly, by defendant and Holmes." This statement would certainly be a revelation to Holmes's survivors. Moreover, there are other offenses in which a perpetrator could be a victim, such as a bank robbery in which a defendant's co-perpetrator was shot and killed, or an arson in which a defendant's co-perpetrator "got caught up in the heat of the moment" and was burned.

HARE v STARR COMMONWEALTH CORPORATION

Docket No. 291476. Submitted September 9, 2010, at Lansing. Decided January 4, 2011, at 9:00 a.m.

Charon Hare, personal representative of the estate of Marcel D. Hare, deceased, brought an action in the Calhoun Circuit Court against Starr Commonwealth Corporation and Selma Melvin, seeking damages following the drowning of the decedent. Starr Commonwealth had been hired by the Family Independence Agency to provide foster-care services to the decedent and Starr Commonwealth had placed the decedent in the home of foster parent Melvin. Plaintiff alleged that Melvin was negligent or grossly negligent in supervising the decedent. Frontier Insurance Company, a New York insurance company, insured Starr Commonwealth under professional-liability and general-liability insurance policies that included Melvin within the scope of their coverage and provided defense counsel for defendants under the policies. The court granted summary disposition in favor of Starr Commonwealth and dismissed it from the action. The court denied Melvin's motion for summary disposition. Melvin then informed her attorneys that she would not appear for trial and would be discharging them. The court granted Melvin's attorneys' motion to withdraw as counsel of record. Following Melvin's refusal to appear, the court entered a default judgment against Melvin. Plaintiff then filed a garnishment action against Frontier. Frontier responded, alleging that it was not indebted to Melvin and was not responsible for any part of the default judgment entered against Melvin. Frontier moved for summary disposition, arguing that the garnishment action should be dismissed on the basis of an order of rehabilitation entered by a New York court that purported to bar any and all legal actions against Frontier. Frontier contended that the circuit court was required to afford full faith and credit to the order of rehabilitation pursuant to Michigan's common law and the Uniform Enforcement of Foreign Judgments Act (UEFJA), MCL 691.1171 *et seq*. Plaintiff filed a cross-motion for summary disposition, contending that the order of rehabilitation constituted an out-of-state antisuit injunction not entitled to legal effect beyond the territorial limits of New York, that it would violate Michigan's public policy to enforce the order of rehabilitation, that

the order was not entitled to full faith and credit or comity because plaintiff had not been subject to the personal jurisdiction of the New York court, and that enforcement of the order would negatively affect plaintiff's substantial rights. The court, Conrad J. Sindt, J., granted Frontier's motion for summary disposition, denied plaintiff's cross-motion, and dismissed plaintiff's claims against Frontier with prejudice, holding that the order of rehabilitation was entitled to full faith and credit. Plaintiff appealed.

The Court of Appeals *held*:

1. Questions concerning the applicability of the UEFJA and the Full Faith and Credit Clause of the United States Constitution are reviewed de novo by the Court of Appeals. The Court of Appeals reviews for an abuse of discretion a circuit court's decision to dismiss a case on the basis of the doctrine of forum non conveniens. The abuse-of-discretion standard governs the appellate review of a circuit court's abstention in favor of an alternative, foreign forum.

2. A foreign judgment, to be enforceable under the UEFJA, must have been entered by a court with jurisdiction over the parties and the subject matter. A sister-state judgment must constitute a final judgment on the merits in order to qualify for recognition under the Full Faith and Credit Clause.

3. The first part of the order of rehabilitation, which declares that Frontier has become insolvent, directs the New York Superintendent of Insurance to take possession of Frontier's property, and authorizes the superintendent to perform various tasks necessary to rehabilitate Frontier's business and affairs, was entitled to full faith and credit by the Michigan courts.

4. The second part of the order of rehabilitation, which provides that all persons are enjoined and restrained from commencing or prosecuting any actions, lawsuits, or proceedings against Frontier or obtaining preferences, judgments, and attachments or other liens against Frontier's assets, was not entitled to full faith and credit. The Full Faith and Credit Clause does not compel a forum state court to recognize and enforce a sister-state antisuit injunction.

5. There was no showing that plaintiff was ever subject to the personal jurisdiction of the courts of New York. The constitution does not compel Michigan's courts to recognize the New York order of rehabilitation as a bar to plaintiff's garnishment claim because the New York court lacked jurisdiction over plaintiff. For the same reasons, the UEFJA did not require the circuit court to recognize and enforce the antisuit provisions of the order of rehabilitation.

6. Michigan has a valid interest in the present matter and enforcement of the antisuit injunction would contravene plaintiff's rights; therefore, recognition of the antisuit injunction was not required under the traditional rules of interstate comity.

7. The circuit court should have abstained from the present garnishment action, dismissing the matter and deferring to the courts of New York on grounds similar to those underlying the doctrine of forum non conveniens.

8. Although the circuit court erred by ruling that the antisuit provisions of the order of rehabilitation were entitled to full faith and credit, it reached the correct result by denying plaintiff's motion for summary disposition and granting summary disposition in favor of Frontier. The Court of Appeals will not reverse when the circuit court has reached the correct result, even if it has done so for the wrong reason.

Affirmed.

1. APPEAL — STANDARDS OF REVIEW — UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT — FULL FAITH AND CREDIT CLAUSE — FORUM NON CONVENIENS — COMITY.

Questions concerning the applicability of the Uniform Enforcement of Foreign Judgments Act and the Full Faith and Credit Clause of the United States Constitution are reviewed de novo on appeal; decisions to dismiss a case on the basis of the doctrine of forum non conveniens or to dismiss a case that is properly within the jurisdiction of the court on the basis of pending or available litigation in an alternative, foreign forum are reviewed for an abuse of discretion (US Const, art IV, § 1; MCL 691.1171 *et seq*.).

2. JUDGMENTS — FOREIGN JUDGMENTS — PRESUMPTION OF VALIDITY — COLLATERAL ATTACKS ON JUDGMENTS.

A judgment entered in another state is presumptively valid and subject to recognition under the Full Faith and Credit Clause of the United States Constitution, although a collateral attack on such a judgment may be made in a Michigan court by showing that the judgment was void for want of jurisdiction over the subject matter or the parties in the court that issued it.

3. JUDGMENTS — UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT.

A foreign judgment, to be enforceable under the Uniform Enforcement of Foreign Judgments Act, must have been entered by a court having jurisdiction over the parties and the subject matter (MCL 691.1171 *et seq*.).

4. CONSTITUTIONAL LAW — JUDGMENTS OF SISTER STATES — FULL FAITH AND CREDIT CLAUSE.

A sister-state judgment must constitute a final judgment on the merits in order to qualify for recognition under the Full Faith and Credit Clause of the United States Constitution (US Const, art IV, § 1).

5. CONSTITUTIONAL LAW — FULL FAITH AND CREDIT CLAUSE — ANTISUIT INJUNCTIONS OF SISTER STATES.

The Full Faith and Credit Clause of the United States Constitution does not compel a forum state court to recognize and enforce sister-state antisuit injunctions (US Const, art IV, § 1).

6. JUDGMENTS — ORDERS — RULE OF COMITY.

The rule of comity is not allowed to operate when it will contravene the rights of a citizen of the state where the action is brought or contravene that state's policies or interests.

Lloyd Johnson & Associates (by *Lloyd G. Johnson*) for Charon Hare.

Garan Lucow Miller, P.C. (by *Robert D. Goldstein* and *Boyd E. Chapin, Jr.*), for Frontier Insurance Company.

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

JANSEN, J. Plaintiff-garnishor, Charon Hare, personal representative of the estate of Marcel D. Hare, deceased, appeals by right the circuit court's order denying her motion for summary disposition and granting summary disposition in favor of garnishee Frontier Insurance Company (Frontier) on the ground that a New York antisuit injunction was entitled to full faith and credit. We affirm, albeit for a different reason than that relied on by the circuit court.

I

This garnishment action arises out of the drowning death of plaintiff's decedent, Marcel D. Hare (Marcel),

in the Kalamazoo River. Marcel had been in foster care with Starr Commonwealth Corporation (Starr Commonwealth) since approximately December 1, 1999. After several unsuccessful short-term placements with various foster families, Starr Commonwealth ultimately placed Marcel in the home of foster parent Selma Melvin (Melvin) on March 28, 2000. On the evening of April 15, 2000, while under the care of Melvin, Marcel jumped from a bridge over the Kalamazoo River and drowned.

On February 28, 2003, plaintiff, as personal representative of Marcel's estate, filed suit against Melvin and Starr Commonwealth in the Calhoun Circuit Court. According to plaintiff, Melvin regularly allowed Marcel to "wander the neighborhood" without adult supervision. Among other things, plaintiff alleged that Melvin had been negligent or grossly negligent by failing to properly supervise Marcel, especially given that Marcel was a special-needs child.

Frontier insured Starr Commonwealth under a professional-liability policy and a commercial, general-liability policy. These policies also included Melvin, as one of Starr Commonwealth's foster parents, within the scope of their coverage. Frontier accordingly provided defense counsel for both Melvin and Starr Commonwealth.

On October 2, 2006, defendants Melvin and Starr Commonwealth jointly moved for summary disposition. On October 25, 2006, the circuit court granted the motion for summary disposition as it related to plaintiff's claims against Starr Commonwealth, dismissing Starr Commonwealth from the action. However, the circuit allowed plaintiff's claims against Melvin to go forward and the matter was scheduled for trial.

Sometime before trial, Melvin informed her attorneys that she had decided not to appear for trial and that she would be discharging them as defense counsel. Citing a breakdown in the attorney-client relationship, Melvin's attorneys filed a motion to withdraw as counsel of record on November 3, 2006. The circuit court granted the attorneys' motion to withdraw on November 20, 2006. As she had threatened to do, Melvin refused to appear in the matter. Consequently, on December 12, 2006, the circuit court entered a default judgment against Melvin in the amount of $350,000 plus case-evaluation sanctions.

On October 24, 2008, plaintiff filed the instant garnishment action in the Calhoun Circuit Court, seeking a writ of nonperiodic garnishment against Frontier in the amount of $393,260 (the amount of the default judgment, plus costs and interest). On November 17, 2008, Frontier filed its garnishee disclosure statement, in which it alleged that it was not indebted to Melvin and was not responsible for any portion of the default judgment entered against her.

On January 5, 2009, Frontier moved for summary disposition. Frontier argued that plaintiff's garnishment action should be dismissed on the basis of a New York "order of rehabilitation," which had been entered by the supreme court of the state of New York, county of New York, on October 10, 2001, and that purported to bar any and all legal actions against Frontier. Frontier attached a copy of the New York order of rehabilitation to its motion for summary disposition. The order of rehabilitation, entered pursuant to the New York insurance law, provides that Frontier is "incorporated in New York," that Frontier is "subject to the New York Insurance Law," that Frontier has become insolvent, that Frontier has "failed to cure its impairment of

capital," and that Frontier has "consented to the entry of the order of rehabilitation[.]" The New York court determined that it was "in the best interest of Frontier's policyholders, creditors and the general public that the [New York] Superintendent [of Insurance] be directed to take possession of Frontier's property and to rehabilitate its business and affairs[.]" The order of rehabilitation directs the New York Superintendent of Insurance to "immediately take possession of [Frontier's] property," to "conduct [Frontier's] business," and to "take such other actions as set forth in . . . the New York Insurance Law." The order of rehabilitation also provides that "[a]ll persons are enjoined and restrained from commencing or prosecuting any actions, lawsuits, or proceedings against Frontier" and that "[a]ll persons are enjoined and restrained from obtaining preferences, judgments, [and] attachments or other liens . . . against Frontier's assets[.]" Frontier contended that the Calhoun Circuit Court was required to afford full faith and credit to the New York order of rehabilitation pursuant to Michigan's common law as well as the Uniform Enforcement of Foreign Judgments Act (UEFJA), MCL 691.1171 *et seq*.[1]

Thereafter, plaintiff filed a cross-motion for summary disposition. Plaintiff argued that the New York order of rehabilitation constituted an out-of-state antisuit injunction that was not entitled to legal effect beyond the

[1] Frontier also argued that it was entitled to summary disposition for an alternative reason. Frontier asserted that Melvin's act of discharging defense counsel and failing to appear for trial violated certain provisions of the insurance policies requiring the insured to cooperate with counsel and assist in defending the action. Because Melvin had not cooperated with counsel or assisted in the defense of the matter, Frontier argued that Melvin was no longer covered under its insurance policies and that it was therefore not required to indemnify her for the default judgment entered against her in the underlying litigation.

territorial limits of the state of New York. Plaintiff further argued that it would violate Michigan's public policy for the circuit court to enforce the New York order of rehabilitation. Lastly, plaintiff argued that the order of rehabilitation was not entitled to full faith and credit or comity because she had not been subject to the personal jurisdiction of the New York courts at the time the order was entered and because the enforcement of the order in Michigan would negatively affect her substantial rights.[2]

Following oral argument, the circuit court issued a written opinion concerning the parties' respective motions for summary disposition. In that opinion, the court observed that "[t]he dispositive issue in these motions for summary disposition . . . is the effect in Michigan of a 2001 Order of the Supreme Court of the State of New York . . . which places [Frontier] in the possession of the Insurance Superintendent of the State of New York . . . and which enjoins all persons from commencing any actions and from obtaining any judgments or liens against Frontier." Relying in part on *Keehn v Charles J Rogers*, *Inc*, 311 Mich 416, 425; 18 NW2d 877 (1945), the circuit court ruled that it was "satisfied . . . that the 2001 New York Supreme Court Order is entitled to full faith and credit in this action and therefore that the garnishment action against [Frontier] must be dismissed." The court went on to state that "[p]laintiff[']s] remedy, if any, against Frontier lies in the State of New York." On March 30, 2009, the circuit court entered a final order granting Frontier's

[2] With respect to Frontier's alternative argument, see footnote 1, plaintiff asserted that Melvin's failure to appear for trial had not prejudiced Frontier and had not nullified the coverage provided for Melvin under the Frontier insurance policies. Plaintiff noted that Melvin had been fully deposed in the litigation and that, although Melvin did not appear, her deposition testimony could have been used at trial.

motion for summary disposition, denying plaintiff's cross-motion for summary disposition, and dismissing plaintiff's claims against Frontier with prejudice.

II

We review de novo a circuit court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). We also review de novo questions concerning the applicability of the UEFJA and the Full Faith and Credit Clause of the United States Constitution. *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 620; 692 NW2d 388 (2004).

The standard of review is less clear as it relates to the issue of comity. Courts use the term "comity" in several different contexts. In the traditional context, courts consider purely whether to enforce a foreign judgment as a matter of "comity." See *Hilton v Guyot*, 159 US 113, 202-203; 16 S Ct 139; 40 L Ed 95 (1895). To a large extent, this traditional notion of comity was at play in *Dart v Dart*, 460 Mich 573, 575; 597 NW2d 82 (1999), wherein the Michigan Supreme Court held that the parties' foreign judgment of divorce was entitled to enforcement in this state even though recognition of the judgment was not constitutionally mandated. In such cases, appellate courts generally appear to apply a de novo standard of review. See *Diorinou v Mezitis*, 237 F3d 133, 139 (CA 2, 2001); see also *Hilton*, 159 US at 203-229; *Dart*, 460 Mich at 580-587.

In a slightly different context, courts often speak of "comity" when considering whether to dismiss litigation properly within their jurisdiction on the basis of pending or available litigation in an alternative, foreign forum. See *Diorinou*, 237 F3d at 139 (noting, in this context, that courts frequently refer to their

"defer[ence] to the foreign tribunal's adjudication of the underlying matter [a]s a matter of 'comity' "); see also *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 625; 719 NW2d 40 (2006) (MARKMAN, J., concurring) (noting that " '[p]rinciples of judicial comity support the dismissal of controversies whose adjudication is a matter of vital interest to the alternative, foreign forum' ") (citation omitted). Although such abstention in favor of an alternative, foreign forum is sometimes described as "comity," it is more essentially akin to a dismissal on the basis of the doctrine of forum non conveniens. *Diorinou*, 237 F3d at 139. In Michigan, appellate courts review for an abuse of discretion a circuit court's decision to dismiss a case on the basis of the doctrine of forum non conveniens. *Radeljak*, 475 Mich at 603; *Hernandez v Ford Motor Co*, 280 Mich App 545, 560; 760 NW2d 751 (2008). It thus appears that a similar abuse-of-discretion standard should govern the appellate review of a circuit court's abstention in favor of an alternative, foreign forum. See *Diorinou*, 237 F3d at 139.

III

We conclude that the circuit court erred by ruling that the antisuit provisions of the New York order of rehabilitation were entitled to full faith and credit.

A

The Full Faith and Credit Clause of the United States Constitution, US Const, art IV, § 1, provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Pursuant to its authority to prescribe the manner of proving acts, records, and judicial proceedings under the Full Faith and Credit Clause, Congress has enacted 28 USC 1738, which provides in relevant part:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such . . . records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. [28 USC 1738.]

In turn, § 3 of the UEFJA, MCL 691.1173, provides:

> A copy of a foreign judgment[3] authenticated in accordance with an act of congress or the laws of this state may be filed in the office of the clerk of the circuit court, the district court, or a municipal court of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court, the district court, or a municipal court of this state. A judgment filed under this act has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of the circuit court, the district court, or a municipal court of this state and may be enforced or satisfied in like manner.

"[A] judgment entered in another state is presumptively valid and subject to recognition in Michigan under the Full Faith and Credit Clause," *Poindexter v*

[3] The UEFJA defines "foreign judgment" as "any judgment, decree, or order of a court of the United States or of any other court that is entitled to full faith and credit in this state." MCL 691.1172.

Poindexter, 234 Mich App 316, 324-325; 594 NW2d 76 (1999), which " 'requires that a foreign judgment be given the same effect that it has in the state of its rendition,' " *Blackburne*, 264 Mich App at 620, quoting *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 406; 509 NW2d 829 (1993). "The purpose of the Full Faith and Credit Clause 'is to prevent the litigation of issues in one state that have already been decided in another.' " *LME v ARS*, 261 Mich App 273, 285; 680 NW2d 902 (2004), quoting *Martino v Cottman Transmission Sys, Inc*, 218 Mich App 54, 58; 554 NW2d 17 (1996).

"Although the Full Faith and Credit Clause requires recognition of the judgments of sister states, 'collateral attack may be made in the courts of this [s]tate by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it.' " *Blackburne*, 264 Mich App at 620-621, quoting *Delph v Smith*, 354 Mich 12, 16; 91 NW2d 854 (1958), in turn quoting *Johnson v DiGiovanni*, 347 Mich 118, 126; 78 NW2d 560 (1956); see also *New York ex rel Halvey v Halvey*, 330 US 610, 614; 67 S Ct 903; 91 L Ed 1133 (1947). Indeed, "the constitution does not compel Michigan courts to recognize [sister-state] judgments where the issuing court lacked jurisdiction over the subject matter or the parties." *Nash v Salter*, 280 Mich App 104, 119-120; 760 NW2d 612 (2008); see also *Blackburne*, 264 Mich App at 621. "Thus, to be enforceable under the UEFJA, the foreign judgment must have been entered by a court with jurisdiction over the parties and the subject matter." *Id*.

In order to qualify for recognition under the Full Faith and Credit Clause, a sister-state judgment must constitute a final judgment on the merits. *Alabama ex rel Governor v Engler*, 85 F3d 1205, 1209 (CA 6, 1996);

In re Forslund, 123 Vt 341, 344; 189 A2d 537 (1963); see also *Halvey*, 330 US at 621 (Rutledge, J., concurring).

B

"As a general rule, judgments are to be construed like other written instruments, and the legal effect of a judgment must be declared in light of the literal meaning of the language used." 46 Am Jur 2d, Judgments, § 74, p 447. It is true that the New York order of rehabilitation at issue in this case contains no language indicating that it is to be afforded extraterritorial effect beyond the boundaries of the state of New York. However, it is equally true that "a State is permitted to determine the extraterritorial effect of its judgments . . . only . . . indirectly, by prescribing the effect of its judgments within the State." *Thomas v Washington Gas Light Co*, 448 US 261, 270; 100 S Ct 2647; 65 L Ed 2d 757 (1980). "To vest the power of determining the extraterritorial effect of a State's own . . . judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of . . . the Constitution to prevent." *Id*. at 272. It is therefore of little significance that the New York order of rehabilitation does not indicate on its face that it is to be afforded extraterritorial effect.

C

The New York order of rehabilitation at issue in this case actually consists of two separate parts. The first part of the order declares that Frontier, a New York insurance company, has become insolvent, directs the New York Superintendent of Insurance "to take possession of Frontier's property," and authorizes the New York Superintendent of Insurance to perform various

tasks that may be necessary to "rehabilitate [Frontier's] business and affairs[.]" It appears beyond dispute that this first portion of the New York order of rehabilitation is entitled to full faith and credit by the Michigan courts. *Keehn*, 311 Mich at 425 (affording full faith and credit to an Illinois state court judgment finding an Illinois insurance company "to be insolvent and vesting its property and assets in a receiver for liquidation"); *U S Truck Co v Pennsylvania Surety Corp*, 259 Mich 422, 424-425; 243 NW 311 (1932) (affording full faith and credit to a Pennsylvania state court judgment declaring that a Pennsylvania insurance company "was dissolved" and that "the insurance commissioner of Pennsylvania took and holds title to the corporate property").

However, the New York order of rehabilitation also consists of a second part. This second part provides that "[a]ll persons are enjoined and restrained from commencing or prosecuting any actions, lawsuits, or proceedings against Frontier" and that "[a]ll persons are enjoined and restrained from obtaining preferences, judgments, [and] attachments or other liens . . . against Frontier's assets[.]" There is an important distinction to be drawn between the first portion of the New York order of rehabilitation, taking control of Frontier's assets and appointing the New York Superintendent of Insurance to rehabilitate Frontier's affairs, and the second portion of the order, purporting to operate as an antisuit injunction and to bar all claims against Frontier. See *Cook v Delmarva Power & Light Co*, 505 A2d 447, 450 (Del Super, 1985). The United States Supreme Court has clarified that the Full Faith and Credit Clause applies with the same force to equitable decrees as it does to judgments at law. *Baker v Gen Motors Corp*, 522 US 222, 234; 118 S Ct 657; 139 L Ed 2d 580 (1998). But this does not necessarily mean that the Full Faith

and Credit Clause compels the recognition of out-of-state antisuit injunctions. See *id*. at 236. Indeed, "[s]tate courts that have dealt with the question have, in the main, regarded antisuit injunctions as outside the full faith and credit ambit." *Id.* at 236 n 9. One reason given for this is that antisuit injunctions generally do not constitute final judgments on the merits. See *Abney v Abney*, 176 Ind App 22, 26; 374 NE2d 264 (1978); see also Scoles & Hay, Conflict of Laws (2d ed), § 24.21, p 981. Another reason given is that, because antisuit injunctions act "upon the parties rather than [the] court, the forum has the power to proceed notwithstanding the sister-state injunction." *Abney*, 176 Ind App at 26; see also *Kleinschmidt v Kleinschmidt*, 343 Ill App 539, 546; 99 NE2d 623 (1951). But whatever the reason, it appears well settled that the Full Faith and Credit Clause does not compel a forum state court to recognize and enforce a sister-state antisuit injunction. See, e.g., *Mahan v Gunther*, 278 Ill App 3d 1108, 1116; 663 NE2d 1139 (1996); *Cook*, 505 A2d at 449; *Abney*, 176 Ind App at 26; *James v Grand Trunk W R Co*, 14 Ill 2d 356, 363-364; 152 NE2d 858 (1958).

Bearing these principles in mind, we conclude that the Full Faith and Credit Clause did not require the circuit court to recognize or enforce that portion of the New York order of rehabilitation purporting to bar "[a]ll persons" from "commencing or prosecuting any actions, lawsuits, or proceedings against Frontier," and from "obtaining preferences, judgments, [and] attachments or other liens . . . against Frontier's assets[.]" Because this portion of the order effectively operated as an antisuit injunction, it fell "outside the full faith and credit ambit." See *Baker*, 522 US at 236 n 9. Moreover, there has been no showing in this case that plaintiff was ever subject to the personal jurisdiction of the courts of New York. Because the New York Supreme Court lacked

jurisdiction over plaintiff, the constitution does not compel the Michigan courts to recognize the New York order of rehabilitation as a bar to plaintiff's present claim. *Nash*, 280 Mich App at 119-120; *Blackburne*, 264 Mich App at 621. Contrary to the circuit court's ruling, we hold that the circuit court was not compelled to give full faith and credit to the antisuit provisions of the New York order of rehabilitation.[4]

IV

Nor can we conclude that the circuit court was required to recognize and enforce the antisuit provisions of the New York order of rehabilitation pursuant to the traditional rules of interstate comity.

As explained earlier, courts use the term "comity" in a variety of different ways. See *Diorinou*, 237 F3d at 139. In the traditional context, Michigan courts have used the term "comity" when considering whether to recognize and enforce a foreign or sister-state judgment. See *Dart*, 460 Mich at 575; see also *Graydon v Church*, 7 Mich 36, 52 (1859).

At times, state courts have given recognition to sister-state antisuit injunctions, and in almost all such circumstances, recognition has been based on the doctrine of interstate comity. See *Fuhrman v United America Insurors*, 269 NW2d 842, 847 (Minn, 1978) (noting that "recognition of an [antisuit] injunction issued in another state is granted strictly as a matter of comity"); *Abney*, 176 Ind App at 27 (observing that "in those instances where deference has been extended [to sister-state antisuit injunctions,] it has been based on

[4] For the same reasons, the UEFJA did not require the circuit court to recognize and enforce the antisuit provisions of the New York order of rehabilitation. *Blackburne*, 264 Mich App at 621.

comity rather than on the constitutional command of Full Faith and Credit"). At the same time, however, it has frequently been stated that "the rules of comity *do not require*" recognition of foreign antisuit injunctions. *Id.* at 27-28 (emphasis added).

Comity is a discretionary doctrine. See *Hilton*, 159 US at 163-164 (explaining that " '[c]omity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other"); see also *Lieberthal v Glens Falls Indemnity Co of Glens Falls*, 316 Mich 37, 54; 24 NW2d 547 (1946) (BUTZEL, C.J., dissenting) (noting that when " 'comity' enters . . . the discretion of the forum is greater"). In general, the doctrine of comity commands that "[t]he courts of a sister state, in a cause and between parties within their jurisdiction, are entitled to so much respect, at least, that [the Michigan courts] should not, without proof, presume them guilty of wrong and oppression." *Graydon*, 7 Mich at 52. But it is well settled that "[t]he rule of comity is not allowed to operate when it will contravene the rights of a citizen of the State where the action is brought." *Keehn*, 311 Mich at 425; see also *Baldwin v Circuit Judge*, 101 Mich 119, 133; 59 NW 432 (1894). Nor will our courts recognize a sister-state judgment under the rules of comity when doing so would contravene this state's policies or interests. *Kircher v Kircher*, 288 Mich 669, 671; 286 NW 120 (1939), questioned in part on other grounds *Hosko v Hosko*, 385 Mich 39 (1971).

As noted previously, there has been no showing in this case that plaintiff was ever subject to the personal jurisdiction of the courts of New York. Furthermore, recognition of the New York antisuit injunction, requiring dismissal of the present action, would certainly contravene the rights of plaintiff—a citizen of this state.

See *Keehn*, 311 Mich at 425. Finally, it cannot be gainsaid that Michigan has a real interest in the present action. After all, the present garnishment action has been brought by a citizen of this state and arises out of a drowning death that occurred within this state as well. For these reasons, we conclude that Michigan has a valid interest in the present action, that enforcement of the New York antisuit injunction would contravene plaintiff's rights in this case, and that recognition of the antisuit injunction is therefore not required under the traditional rules of interstate comity.

V

Nevertheless, we find that the circuit court should have abstained from the present controversy, deferring to the courts of New York on grounds similar to those underlying the doctrine of forum non conveniens.

As explained earlier, abstention in favor of an alternative, foreign forum has often been described as a species of "comity." See, e.g., *Radeljak*, 475 Mich at 625 (MARKMAN, J., concurring) (noting that " '[p]rinciples of judicial comity support the dismissal of controversies whose adjudication is a matter of vital interest to the alternative, foreign forum' "); *Cook*, 505 A2d at 449 (stating that " '[i]f a court stays pending proceedings or abates an action by reason of a foreign anti-suit injunction, it does so solely on the ground of comity, and not because the Federal Constitution requires it so to act' ") (citation omitted). However, as explained by the United States Court of Appeals for the Second Circuit, when courts abstain on such a ground and defer to an alternative, foreign forum, "they are invoking a doctrine akin to forum non conveniens." *Diorinou*, 237 F3d at 139 (italics omitted); see also *Lexington Ins Co v Forrest*, 263 F Supp 2d 986, 1002 (ED Pa, 2003) (observ-

ing, albeit in the international context rather than the interstate context, that principles of comity "[s]imilar to the doctrine of forum non conveniens" permit a court "to exercise its discretion and dismiss a case over which it has subject matter jurisdiction in deference to the laws and interests of another [forum]").

" 'Forum non conveniens' is defined as the 'discretionary power of [a] court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum.' " *Radeljak*, 475 Mich at 604, quoting Black's Law Dictionary (6th ed). It is a common-law doctrine that allows a court to decline to hear a case even though the court otherwise has jurisdiction. *Radeljak*, 475 Mich at 604. Among the relevant factors to be considered in deciding whether to dismiss an action on the basis of forum non conveniens are " 'the state law which must govern the case' " and the " '[p]eople who are concerned by the proceeding.' " *Id*. at 606, quoting *Cray v Gen Motors Corp*, 389 Mich 382, 396; 207 NW2d 393 (1973). It has been held that the doctrine of forum non conveniens may be raised sua sponte by the court. *Commonwealth Land Title Ins Co v Pugh*, 555 NW2d 576, 579 (ND, 1996); *Haynes v Carr*, 379 A2d 1178, 1180 (DC App, 1977).

Frontier is an insolvent New York insurance company that is subject to the New York insurance laws. Through the order of rehabilitation at issue in this case, the New York Supreme Court has placed its imprimatur on the complicated and intricate process of rehabilitating Frontier's affairs and restructuring Frontier's business operations. This process, which is carried out in accordance with the laws of the state of New York and under the direction of the New York Superintendent of Insurance, does not fall within the general experience of

the Michigan courts. In contrast, the courts of New York are in a superior position to enforce New York's insurance laws, and New York certainly has substantial experience with its own process of rehabilitating insolvent insurers. Moreover, New York presumably has good reason for enjoining lawsuits against insolvent insurance companies like Frontier during the rehabilitation period, and principles of interstate comity persuade us to respect New York's decision with respect to this issue. *Graydon*, 7 Mich at 52. It is not the place of the Michigan courts to second-guess New York's insurance laws or to undermine New York's rehabilitation procedures.

Allowing plaintiff's instant garnishment action to go forward would tend to undermine New York's attempt to rehabilitate Frontier Insurance Company—a process that has already been ongoing for several years. Given the complexity of New York's insurance laws and the purpose of New York's rehabilitation process for insolvent insurers, we conclude that the circuit court should have abstained from the present garnishment action, dismissing the matter and deferring to the courts of New York on grounds similar to those underlying the doctrine of forum non conveniens. See *Radeljak*, 475 Mich at 625 (MARKMAN, J., concurring).

VI

In sum, while the circuit court erred by ruling that the antisuit provisions of the New York order of rehabilitation were entitled to full faith and credit, it reached the correct result by denying plaintiff's motion for summary disposition and granting summary disposition in favor of Frontier. Although the circuit court employed incorrect reasoning in this case, it correctly observed that "[p]laintiff['s] remedy, if any, against

Frontier lies in the State of New York." It is well settled that we will not reverse when the circuit court has reached the correct result, even if it has done so for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

In light of our resolution of the issues, we need not consider plaintiff's argument concerning *Frontier Ins Co v Blaty*, 454 F3d 590 (CA 6, 2006). Nor need we consider the alternative ground for affirmance raised by Frontier on appeal.

Affirmed. No taxable costs pursuant to MCR 7.219, a public question having been involved.

PEOPLE v KOLANEK

Docket No. 295125. Submitted November 2, 2010, at Detroit. Decided January 11, 2011, at 9:00 a.m.

Alexander E. Kolanek was charged in the 52-3 District Court with possession of marijuana. He moved for dismissal of the charge, asserting the affirmative defense provided by the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. After an evidentiary hearing, the court, Julie A. Nicholson, J., concluded that the defense was not available because defendant had not shown that a physician had approved his medical use of marijuana before defendant's arrest or that he had seriously discussed the use of marijuana as a therapeutic benefit between the date of the MMMA's enactment and defendant's arrest. Defendant appealed in the Oakland Circuit Court, and the circuit court, Edward Sosnick, J., concluded that the MMMA did not require the physician's statement to be made at any particular time and that the physician's statement made at the evidentiary hearing, that defendant suffered from a debilitating medical condition and would benefit medically from the use of marijuana, was sufficient for the defense. The circuit court reversed the district court's denial of defendant's motion to dismiss. The prosecution appealed.

The Court of Appeals *held*:

1. A person facing possible prosecution for violating Michigan's controlled substances laws may assert an affirmative defense under MCL 333.26428(a) if a physician has stated that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition. This language requires that the physician's statement must be made before the person's arrest.

2. Because MCL 333.26428(a) created a new right that did not exist before the enactment of the MMMA, the affirmative defense it provides is effective only if the patient actively sought physician approval on or after December 4, 2008. Defendant's July 14, 2008, discussion with his physician did not take place at

a time the affirmative defense was available to defendant and thus was not effective as the physician's statement required by MCL 333.26428(a). The circuit court erred in concluding that the district court erroneously denied defendant's motion to dismiss.

Reversed and remanded for reinstatement of charges.

1. CONTROLLED SUBSTANCES — MEDICAL MARIJUANA — CRIMINAL DEFENSES — UNREGISTERED MEDICAL MARIJUANA USERS.

A person facing possible prosecution for violating Michigan's controlled substances laws may assert an affirmative defense under MCL 333.26428(a) if a physician has stated that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; but the physician's statement must have been made before the person's arrest.

2. CONTROLLED SUBSTANCES — MEDICAL MARIJUANA — CRIMINAL DEFENSES — UNREGISTERED MEDICAL MARIJUANA USERS.

The affirmative defense provided under the Michigan Medical Marihuana Act for a person whose physician has stated that medical use of marijuana would provide therapeutic or palliative benefits for the person is effective only if the patient actively sought physician approval on or after December 4, 2008 (MCL 333.26428[a]).

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *John S. Pallas*, Chief, Appellate Division, and *Thomas R. Grden*, Assistant Prosecuting Attorney, for the people.

Mark A. Ambrose and *Shawn Patrick Smith* for defendant.

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM. This case requires us to consider an issue of first impression involving the interpretation of

the Michigan Medical Marihuana[1] Act (MMMA), MCL 333.26421 *et seq.*, namely, when a physician must provide the statement required under MCL 333.26428(a)(1). Because we conclude that the statement must occur after the enactment of the MMMA, but prior to arrest, we reverse the circuit court's reversal of the district court's denial of defendant's motion to dismiss, and we remand to the circuit court for reinstatement of the charge against defendant and other necessary proceedings.

I. BACKGROUND

On April 6, 2009, defendant was involved in an altercation that ultimately resulted in a search of defendant's vehicle and the seizure of eight marijuana cigarettes from the trunk of defendant's vehicle. On April 7, 2009, defendant was charged with possession of marijuana pursuant to MCL 333.7403(2)(d). Although defendant originally filed a motion to suppress evidence, he withdrew his motion on June 3, 2009, and instead asserted an affirmative defense under the MMMA, moving to dismiss on those grounds on June 10, 2009. On June 17, 2009, an evidentiary hearing was held on defendant's assertion of the defense.

Defendant admitted that he had eight marijuana cigarettes in his possession at the time of his arrest, but testified that he used them for relief from pain and nausea caused by his Lyme disease. Defendant offered the testimony of Dr. Ray Breitenbach, who had been treating defendant for nine years. Breitenbach testified that defendant has chronic Lyme disease, which causes symptoms such chronic severe pain, arthralgia, fatigue, and malaise. Breitenbach stated his opinion that defen-

[1] Although the statute spells it "marihuana," unless used in a direct quotation, we have spelled it throughout as "marijuana."

dant is "likely to receive therapeutic . . . benefit from the medical use of marijuana." This opinion was memorialized in a document signed by Breitenbach on June 9, 2009. Breitenbach testified that, in his opinion, defendant would have been eligible to use marijuana on April 6, 2009. He further testified that it would have been reasonable for defendant to use two grams or less per day to treat his Lyme disease, that defendant's possession of 1½ ounces would be "very reasonable," and that his possession of 2 ounces would not be unreasonable.[2]

Defendant requested that Breitenbach authorize medical use of marijuana on April 12, 2009, after the law permitting medical use became effective. Breitenbach testified that he and defendant had previously discussed the potential for defendant to use marijuana for medical purposes, but that defendant did not make his actual request until April 12, 2009. According to defendant, he had an appointment with Breitenbach on July 14, 2008, during which they discussed the upcoming vote on the medical use of marijuana, and Breitenbach indicated to defendant that he would support defendant using medical marijuana for medical purposes.

When defendant finally made the request of Breitenbach in April 2009, he did not inform Breitenbach that he had been arrested and charged with possession of marijuana; Breitenbach did not learn this until later. Breitenbach testified that the timing of defendant's request was irrelevant, however, because in his opinion, defendant is "totally eligible and capable and in need of medical marijuana," and he would have given defendant the authorization regardless of whether defendant had been charged or convicted.

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[2] Although there seemed to be some confusion in the questioning such that Breitenbach appeared to say defendant needed to use 1½ ounces a day, we believe that this is the more reasonable interpretation of his testimony based on what was asked and answered.

Defendant completed the affidavit in support of his assertion of the MMMA for the purpose of his affirmative defense and motion to dismiss on June 9, 2009. In that affidavit, he stated that he uses marijuana for chronic pain and nausea caused by the Lyme disease. Also on June 9, 2009, defendant prepared an affidavit of qualifying patient, indicating that he was a patient qualifying for the medical use of marijuana. Defendant represented that Breitenbach had diagnosed defendant with a debilitating medical condition, Lyme disease, and that in Breitenbach's opinion defendant would likely "receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate that debilitating medical condition or symptoms associated with that debilitating medical condition."

Defendant offered into evidence his qualifying patient certificate, which indicated that his illness qualified him as eligible to use marijuana for medical purposes. He also provided his application form for a medical-marijuana registry identification card, which he prepared on April 12, 2009. The Michigan Department of Community Health issued him a registration card two weeks later. Defendant explained that he did not register for the medical-marijuana program before April 12, 2009, because the application form was not available online until April 8, 2009, two days after his arrest.

The district court issued its opinion on July 1, 2009, and found that defendant had not satisfied the requirements for stating the defense. It noted that defendant did not provide evidence to show that a physician had approved his medical use of marijuana *before* his arrest or that he had "seriously discussed the use of marijuana as a therapeutic benefit" with Breitenbach between December 2008, when the MMA was enacted, and April

6, 2009, the date of his arrest. The court focused on the language of MCL 333.26428(a)(1) that " 'a physician has *stated* that . . . the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana . . . .' " It construed that language as requiring a determination by the physician regarding the matter before a patient is arrested for an offense.

Defendant appealed to the circuit court. The circuit court interpreted the statute differently than did the district court, reasoning:

> This Court finds that the District Court's interpretation of "has stated" is at odds with the nonuse of the defined term "qualifying patient" and the use, instead, of the undefined term "patient." A qualifying patient is a person who has been diagnosed by a physician as having a debilitating medical condition. MCL 333.26423(h). The statute does not limit the use of the defense stated in MCL 333.26428(b) to qualifying patients, but more broadly offers the defense to all patients. Since the authors of the statute did not require that the person asserting the defense have been previously diagnosed by a physician as having a debilitating medical condition, it seems unlikely that they intended that the defense be limited to persons who had previously discussed the use of medical marijuana with their physician, or to persons who had obtained some statement from their physician before arrest. Giving the words used their plain and ordinary meaning, the Court cannot assign any further meaning to the words, "has stated," than that the following subject matter was expressed by a physician. The statute does not require the physician have stated this before the defendant's arrest. It merely requires that the physician has stated it. In this case, the physician stated it at the hearing. The statute simply does not require that the physician have stated it at some other time or in some other context.

Based on its interpretation, the circuit court reversed the district court's denial of defendant's motion to dismiss.

The prosecution filed an application for leave to appeal the circuit court's October 27, 2009, opinion and order, which this Court granted. *People v Kolanek*, unpublished order of the Court of Appeals, entered March 29, 2010 (Docket No. 295125).

II. STANDARD OF REVIEW

> This issue presents a question of statutory interpretation. We review de novo issues of statutory interpretation. Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature's intent. The MMMA was enacted as a result of an initiative adopted by the voters. The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters. We presume that the meaning as plainly expressed in the statute is what was intended. [*People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010) (quotation marks and citations omitted).]

III. ANALYSIS

A. REGISTRY CARD

The prosecution first argues that a valid registry identification card is required to assert a defense under § 8 of the MMMA. This issue is easily resolved because this Court held to the contrary in *Redden*, 290 Mich App at 81. Accordingly, the fact that defendant did not have a valid registry card at the time of his arrest did not preclude him from asserting this defense.

B. TIMING OF PHYSICIAN STATEMENT

We must next consider the specific issue ruled on by the courts below: when a physician must provide his professional opinion under MCL 333.26428(a)(1) in order for a defendant to assert the § 8 defense.

MCL 333.26428 provides in relevant part:

(a) Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:

(1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;

(2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and

(3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

(b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

1. AFFIRMATIVE DEFENSE

As an initial matter, we reject the prosecution's assertion that the very nature of an affirmative defense requires that it not be retroactive because it is a legal justification for the conduct that exists at the time the

crime is committed. Certain affirmative defenses, such as that provided by a statute of limitations, see MCL 767.24 and MCR 2.111(F)(3)(a), simply cannot exist at the time the conduct is committed. Additionally, nothing in the definition of an affirmative defense contains such a requirement: " 'An affirmative defense is one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it[.]' " *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997) (citation omitted). An affirmative defense does not negate selected elements or facts of the charged crime. *Id.* An affirmative defense essentially concedes the facial criminality of the conduct and presents a basis to avoid conviction. *People v DuPree*, 284 Mich App 89, 99-100; 771 NW2d 470 (2009), aff'd 486 Mich 693 (2010), quoting *People v Pegenau*, 447 Mich 278, 319; 523 NW2d 325 (1994) (opinion by BOYLE, J.). Accordingly, simply because the initiative labeled the § 8 defense an affirmative defense does not resolve the question of whether a physician's recommendation that is acquired subsequent to arrest is sufficient.

2. "HAS STATED"

The primary substantive question in this case is how to interpret the requirement in MCL 333.26428(a)(1), that "[a] physician *has stated*" the medical benefit to the patient. We conclude that "has stated" requires that the physician's opinion be established prior to arrest. First, because the term is present perfect tense, the initiative must have intended that the physician's opinion be stated prior in time to some event. That event would reasonably be "any prosecution involving marihuana," MCL 333.26428(a), for which the defense is being presented. Thus, because the arrest begins the prosecution, the physician's opinion must be stated prior to the arrest.

Furthermore, § 8(a)(1) speaks of a physician stating that "the patient *is* likely *to* receive therapeutic or palliative benefit from the medical use of marihuana." (Emphasis added.) Thus, the language contemplates a situation where a physician, at the time of providing the statement, is envisioning the future possession and use of marijuana and rendering an opinion that it will benefit the patient when it is later used.

This interpretation is also consistent with the fact that the right to bring a motion to dismiss as provided for in § 8(b) requires a showing at an evidentiary hearing of "the elements listed in subsection (a)." It would not make sense to permit someone to "show the elements in subsection (a)," which requires that a physician "has stated" the benefits, by bringing a physician to the motion hearing to state, for the first time, that the defendant would receive such a benefit.

Our interpretation is also consistent with both California's and Oregon's interpretation of their medical-marijuana initiatives.

Under California's Medical Marijuana Program (MMP), Cal Health & Safety Code 11362.7 *et seq.*, "qualified patients," as well as persons with identification cards, are provided a defense at trial to criminal liability for certain marijuana-related crimes. Cal Health & Safety Code 11362.765. A "qualified patient" is defined as "a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article." Cal Health & Safety Code 11362.7(f). Section 11362.5 is the Compassionate Use Act (CUA), which is the voter-approved initiative.[3] Section 11362.5(b)(1)(A) provides:

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[3] The MMP was passed by the California Legislature "to address issues not included in the CUA so as to promote the fair and orderly implementation of the CUA." *People v Wright*, 40 Cal 4th 81, 85; 51 Cal Rptr 3d 80; 146 P3d 531 (2006).

> To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of [a variety of listed illnesses], or any other illness for which marijuana provides relief.

California courts determined that to be a "qualifying patient" under the MMP, a person need only meet the elements set forth in § 11362.5(b)(1)(A). See *People v Wright*, 40 Cal 4th 81, 93-94; 51 Cal Rptr 3d 80; 146 P3d 531 (2006). California courts concluded that "[i]n order to present a CUA defense . . . , a defendant must have obtained a recommendation to use medical marijuana prior to his or her arrest." *People v Windus*, 165 Cal App 4th 634, 643; 81 Cal Rptr 3d 227 (2008). The interpretation is consistent with the language of the CUA, which requires that the physician "has determined," implying that the determination occur prior to the assertion of the defense. See also *People v Rigo*, 69 Cal App 4th 409, 414-415; 81 Cal Rptr 2d 624 (1999) (holding that "post-arrest approval is insufficient to allow application of the compassionate use statute" because "[t]o sanction the use of marijuana under the facts presented herein would encourage the use of marijuana for any idiosyncratic problem, whether medically valid or not, with an ensuing attempt to seek medical approval after an arrest intervened").

Oregon's statute, which was also the result of a voter initiative, is similar although not identical to Michigan's, and provides, in relevant part:

> (1) Except as provided in [Or Rev Stat] 475.316 and 475.342, it is an affirmative defense to a criminal charge of possession or production of marijuana, or any other criminal offense in which possession or production of marijuana is an element, that the person charged with the offense is a person who:

> (a) Has been diagnosed with a debilitating medical condition within 12 months prior to arrest and been advised by the person's attending physician that the medical use of marijuana may mitigate the symptoms or effects of that debilitating medical condition[.] [Or Rev Stat 475.319(1)(a).]

In *Oregon v Root*, 202 Or App 491, 493-494; 123 P3d 281 (2005), the defendant challenged the trial court's refusal to permit him to assert the medical-marijuana defense based on the trial court's conclusion that the physician's certification, obtained postarrest, was insufficient under the statute. The Oregon Court of Appeals looked at the text and context of the statute and determined that the intent was that "the doctor's advice must come *before* a citizen is free to use marijuana without fear of civil or criminal penalties," based on the present perfect tense language requiring that a defendant "has been advised." *Id.* at 495-497.

We find these cases persuasive, particularly because they involve the interpretation of present perfect tense language found in similar medical-marijuana voter initiatives. Moreover, it is reasonable to assume that the affirmative defense created in § 8 was intended to protect those who actually have a medical basis for marijuana use recognized by a physician before the use began and was not intended to afford defendants an after-the-fact exemption for otherwise illegal activities. The law generally denies defendants the ability to excuse a criminal violation postarrest. Thus, defendants cannot escape prosecution for a violation of the concealed weapon statute by seeking a permit after arrest, or escape prosecution for violations of the controlled substances act by seeking a prescription for the substance from a physician after arrest. Furthermore, the very fact that the law creates the ability to legitimately have a defense to certain actions that would

otherwise be illegal indicates that persons must fulfill those requirements prior to any arrest. Otherwise, there would be no incentive for anyone to spend their time and money to go through the process; people would simply engage in the illegal activity, rolling the dice that they will not get caught, with the understanding that, if they do get arrested, they can subsequently receive a retroactive exemption. Accordingly, we hold that the language in MCL 333.26428(a)(1), "[a] physician has stated," requires that a physician's statement of the medical benefit of marijuana be made prior to arrest.

This determination does not resolve the case before us, however, because defendant provided testimony that, although he did not receive an affidavit from Breitenbach prior to his arrest, he had previously discussed his potential for medical use of marijuana with Breitenbach, who indicated that he would support defendant's using marijuana for medical purposes. The district court concluded that this testimony was insufficient because it did not occur in the time between the enactment of the MMMA and defendant's arrest (between December 4, 2008, and April 6, 2009). Rather, the evidence indicates that the discussion occurred on July 14, 2008, and was related to the upcoming vote. Thus, the next question we must answer is whether a discussion that occurred prior to the enactment of the MMMA is sufficient to establish a defense under § 8(a)(1).

Looking again at California law, California permits for the assertion of the defense physicians' determinations made before the CUA's enactment. See *Rigo*, 69 Cal App 4th at 414 (concluding that defendant's argument that "it was impossible to obtain authorization to cultivate marijuana prior to the effective date of the Act

because physicians had no legal authority to recommend or approve the use of marijuana" was without merit because it had, in fact, occurred in other cases). However, this result appears to be necessary based on California caselaw that the defense contained in the CUA could be asserted retroactively, so that a defendant's arrest prior to the Act's passage does not preclude his assertion of the defense. See *id.* at 412; *People v Trippet*, 56 Cal App 4th 1532; 66 Cal Rptr 2d 559 (1997). Because California permits retroactive assertion of the medical-marijuana defense, a defendant in California would have to have had a discussion with his physician prior to the passage of the voter initiative in order to assert the defense retroactively. Unlike California, however, Michigan has held that there is no retroactive application of the medical-marijuana defense. *People v Campbell*, 289 Mich App 533, 536; 798 NW2d 514 (2010). Accordingly, we conclude that California caselaw is inapplicable to this specific question.

In *Campbell*, this Court noted that "MCL 333.26428(a) created a new right that did not exist before the enactment of the MMA by providing an affirmative defense to a criminal defendant facing prosecution for crimes related to the use of marijuana." *Id.* Because the affirmative defense did not even exist before December 4, 2008, it seems counterintuitive to permit a prior statement by a physician to satisfy the affirmative-defense requirements. While people may have spoken with their physicians about whether a medical-marijuana law would be enacted and whether the physicians might then take action to assist them in qualifying for medical use, until the MMMA was actually enacted, such discussions were speculative. We are not convinced that such discussions prior to the enactment of the MMMA are sufficient to support a defense

that did not yet exist.[4] The more reasonable conclusion is that it was not until the passage of the MMMA that the required patient-physician discussions about eligibility for medical use of marijuana could occur. This interpretation provides protection to those who actively sought physician approval after the defense actually became available, while requiring more than just a speculative discussion about whether a person might possibly be eligible should the measure actually pass.

Consequently, we hold that in order to meet the requirement that a physician "has stated" a benefit to a patient from medical use of marijuana, the physician's statement must have occurred after the enactment of the MMMA, but prior to arrest.

3. APPLICATION TO DEFENDANT

Given our conclusion that the discussion with the physician must have occurred after the enactment of the MMMA, but prior to arrest, neither defendant's post-arrest affidavit nor his pre-MMMA enactment discussion with his physician is sufficient to meet the requirements of MCL 333.26428(a)(1).

Accordingly, the circuit court on appeal erred in concluding that the charge against defendant should have been dismissed by the district court and we remand for reinstatement of the charge. Because the statute does not provide that the failure to bring, or to win, a pretrial motion to dismiss deprives the defendant of the statutory defense before the fact-finder, defen-

[4] We also note that, as indicated above, the statement under § 8(a)(1) must provide that "the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana," and here defendant testified that Breitenbach simply stated that he would support defendant's use of marijuana. There is no testimony or evidence that in July 2008 Breitenbach expressly made the statement required by § 8(a)(1).

dant's failure to provide sufficient proofs pursuant to his motion to dismiss does not bar him from asserting the § 8 defense at trial or from submitting additional proofs in support of the defense at that time.

We do not retain jurisdiction.

In re FORFEITURE OF A QUANTITY OF MARIJUANA

Docket No. 291993. Submitted October 6, 2010, at Lansing. Decided January 11, 2011, at 9:05 a.m.

The Saginaw County Prosecutor filed a complaint in the Saginaw Circuit Court, seeking an order of forfeiture pursuant to MCL 333.7521 for various items of personal and real property and to quiet title to real property, naming Gerald and Royetta Ostipow as defendants, together with their son, Steven P. Ostipow. The complaint alleged that a residence at 3551 East Allan Road, titled in Gerald's name, had been used as an indoor facility for growing marijuana. Most of the personal property had been seized from a different residence, where the Ostipows lived. In response to the complaint, claimants and Steven filed a handwritten document listing the property they wanted back. Plaintiff moved for summary disposition, and claimants filed an answer to the complaint in which they asserted that they were innocent owners, and filed a response to plaintiff's motion with which they filed affidavits stating they were innocent owners with no knowledge of any illegal activity associated with the property. The court, William A. Crane, J., granted the motion, concluding that claimants' affidavits were insufficient to create a question of fact on that issue. Claimants appealed.

The Court of Appeals *held*:

1. Property that is used to aid in the violation of the state's controlled substance proscriptions may be subject to forfeiture under MCL 333.7521. The statute provides an affirmative defense to the forfeiture if the property owner lacked knowledge of or did not consent to the illegal act on which the forfeiture is premised. MCL 333.7521(1)(f). Although the burden is on the claimant to affirmatively prove the facts supporting the defense, the claimant is not required to show that it did everything that reasonably could be expected of it to prevent the activity. Claimants filed affidavits asserting that they had no knowledge of any criminal activity associated with the property and that they were innocent owners with respect to the property. Because plaintiff failed to produce clear and decisive, admissible evidence to rebut claimants' asserting the defense, summary disposition should not have been granted in its favor.

2. The innocent-owner defense is an affirmative defense that must be stated in a party's responsive pleading or else it is considered waived. Claimants' handwritten letter to the court, filed *in propriis personis*, was not an answer or a responsive pleading. Therefore, their failure to raise the defense in their letter did not constitute a waiver of it. It was sufficient that claimants' counsel raised the defense in the answer filed in response to the complaint.

Reversed.

O'CONNELL, P.J., dissenting, would have held that claimants' affidavits were insufficient to establish that they were innocent owners because the statements were merely conclusory assertions that they knew nothing of their son's illegal activity, and they did not present any specific facts supporting those conclusions.

FORFEITURES AND PENALTIES — CONTROLLED SUBSTANCES — INNOCENT OWNERS.

Property that is used to aid in the violation of the state's controlled substance proscriptions may be subject to forfeiture under MCL 333.7521; MCL 333.7521(1)(f) provides an affirmative defense to the forfeiture if the property owner lacked knowledge of or did not consent to the illegal act on which the forfeiture is premised; although the burden is on the claimant to affirmatively prove the facts supporting the defense, the claimant is not required to show that it did everything that reasonably could be expected of it to prevent the activity.

Michael D. Thomas, Prosecuting Attorney, and *A. George Best II*, Assistant Prosecuting Attorney, for the people.

Burkhart, Picard, Tiderington & McLeod, PLLC (by *Thomas D. Burkhart*), for Gerald and Royetta Ostipow.

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

MARKEY, J. In this forfeiture action, claimants Gerald Ostipow and Royetta Ostipow[1] appeal by right the trial

[1] Claimant Steven Paul Ostipow has not appealed, so further references to "claimants" designate Gerald Ostipow and Royetta Ostipow only.

court's order granting plaintiff's motion for summary disposition. The trial court denied claimants' motion for reconsideration but granted claimants' motion for stay provided claimants posted a $150,000 bond. This Court declined to review the bond conditions of the stay. We now reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

On June 13, 2008, plaintiff filed a complaint for forfeiture and to quiet title to real property, naming claimants as defendants, together with their son, Steven Ostipow, as well as the various items of personal property for which plaintiff sought an order of forfeiture pursuant to MCL 333.7521. Plaintiff sought forfeiture of claimants' real property at 3551 East Allan Road in Shiawassee County under MCL 333.7521(1)(c), alleging in subparagraph 5(a) of the complaint that the residence was used or intended to be used as a container for controlled substances, or for raw materials, products, or equipment of any kind, used or intended to be used to manufacture, compound, process, or deliver a controlled substance. The complaint in subparagraphs 5(b) and 5(c) further alleged that the real property was subject to forfeiture under MCL 333.7521(1)(f) because it was a thing of value used or intended to be used to facilitate any controlled substances violation, or was traceable to proceeds of controlled substance violations. Regarding the factual basis to justify forfeiture, the complaint alleged that the Saginaw County Sheriff's Department executed a search warrant at 3551 East Allan Road on April 25, 2008, and discovered marijuana growing inside the residence. Steven Ostipow purportedly admitted that he was responsible for the marijuana-growing operation. A subsequent search

warrant was executed at claimants' residence located at 3996 Allan Road, where Steven also resided, resulting in authorities seizing most of the subject personal property. Plaintiff alleged that Gerald Ostipow held title to the property at 3551 East Allan Road and that Royetta Ostipow, his wife, held an equitable interest in the property. To support an inference that claimants were aware of Steven's marijuana-growing operation at the East Allan Road residence, plaintiff alleged Steven told authorities that "his father had talked to him about getting a job and not growing marijuana."

In response to the complaint, Steven and claimants filed a handwritten document with the trial court on July 3, 2008, with the heading: "Here is a list of the Items we want Back." The list included the property at 3551 East Allan Road, a Chevrolet Nova, a Ski-Doo snowmobile, 15 guns, rifles, and a muzzle loader, ammunition, gun cases, scopes, and $360 in cash. This document did not answer any of the allegations of the complaint, nor did it contain any allegations of fact. Plaintiff contends that after a proper answer complying with the court rules was not timely filed, it attempted to file a default but the court's clerk refused on the basis that claimant's handwritten letter was an answer to the complaint. So plaintiff subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10), arguing that Steven and claimants had failed to state a claim upon which relief could be granted or to argue a defense or affirmative defense, and, therefore, plaintiff was entitled to judgment as a matter of law. Plaintiff also argued that claimants' failure to admit or deny the allegations in the complaint should be treated as admissions pursuant to MCR 2.111(C), (D), and (E).

Before plaintiff's motion was heard, claimants obtained counsel and on August 20, 2008, filed an answer to plaintiff's complaint that included affirmative defenses. On the same day, they filed an answer to plaintiff's motion for summary disposition. The answer to the complaint denied plaintiff's allegation that Steven made a statement regarding a statement that Gerald had made. As affirmative defenses, claimants alleged that the Saginaw Circuit Court lacked jurisdiction to hear the case because the property was seized in Shiawassee County,[2] and that claimants were innocent owners who lacked any knowledge of illegal activity related to the real and personal property for which plaintiff sought an order of forfeiture. In support of this last allegation, each claimant filed an affidavit with the

[2] Although not raised as an issue on appeal, venue for this action is improper in Saginaw County. Claimants raised this issue in the trial court as one of jurisdiction, but the circuit court has statewide jurisdiction. See MCL 600.751 ("The courts of record of this state shall have jurisdiction over land situated within the state whether or not the persons owning or claiming interests therein are subject to the jurisdiction of the courts of this state."), and MCL 600.755 (statewide jurisdiction for personal property). But venue regarding a claim to an interest in real property lies in the county where situated. MCL 600.1605; *Kruithoff v Bertrand*, 43 Mich App 233, 234; 203 NW2d 755 (1972). All the personal property at issue was seized in Shiawassee County, and the real property is situated in Shiawassee County. In addition, the forfeiture complaint alleges only criminal activity in Shiawassee County. Consequently, it appears that venue regarding the forfeiture of the personal property would also properly be Shiawassee County. MCL 600.1605; *In re Forfeiture of Certain Personal Prop*, 441 Mich 77, 88 n 8; 490 NW2d 322 (1992).

Despite the apparent improper venue, claimants must still move the trial court for a change of venue. A judgment entered in Saginaw County would not be voidable on the basis of improper venue. See MCL 600.1645 ("No order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue.") and MCL 600.1651 ("An action brought in a county not designated as a proper county may nevertheless be tried therein, unless a defendant moves for a change of venue within the time and in the manner provided by court rule . . . .").

court on August 25, 2008, averring they were innocent owners having no knowledge of any illegal activity associated with the property.

The trial court held a hearing on plaintiff's motion for summary disposition on January 12, 2009. Plaintiff argued that because claimants' initial handwritten letter failed to state either a claim upon which relief can be granted or a defense or affirmative defense and because it did not raise a genuine issue of material fact, plaintiff's motion should be granted. Plaintiff also argued claimants' affidavits stating their ignorance of illegal activity that occurred on their real property were insufficient to support their affirmative defense of innocent ownership. Claimants' counsel argued that claimants, through their answer, affirmative defenses, and affidavits, had raised material questions of fact regarding their affirmative defense of being innocent owners. Counsel further argued that the court must review all the pleadings in the light most favorable to the nonmoving party and that, if it did so, the presence of material issues of fact precluded granting summary disposition to plaintiff.

The trial court apparently accepted plaintiff's argument, and granted the motion for summary disposition. The court remarked regarding the pleadings filed by claimants' attorney that claimants "just deny criminal activity and assert they're innocent owners, but I . . . didn't see any affirmative defenses. I don't even see any answer that gives the prosecutor some basis on which to respond as to why they're innocent owners." The court acknowledged that claimants had filed affidavits asserting they were innocent owners but observed that claimants' affidavits provided nothing "different than what the answer says."

The trial court held a hearing on claimants' motion for reconsideration on April 6, 2009. In denying the motion, the trial court again ruled that claimants' affidavits stating that they were unaware of any illegal activity related to their property were insufficient to require a trial.

The trial court's order granting summary disposition and order of forfeiture was entered January 13, 2009. The court's order denying reconsideration was entered on April 17, 2009. This appeal followed.

II. STANDARD OF REVIEW

The trial court may grant summary disposition of all or part of a claim or defense when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). While plaintiff cited additional court rules in support of its motion, and the trial court did not state on which rule it relied, the record establishes the court considered claimants' answer and affidavits but found them insufficient to raise a material issue of fact warranting trial. Accordingly, we review the trial court's ruling under MCR 2.116(C)(10). See *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

This Court reviews de novo whether a trial court has properly granted a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Likewise, we review de novo issues of statutory interpretation, as well as the proper interpretation of court rules. *Id.*; *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005).

III. ANALYSIS

We agree with claimants' argument below and on appeal that their answer, affirmative defenses, and affidavits raised material issues of fact regarding claimants' so-called innocent owner affirmative defense sufficient to avoid summary disposition. We conclude that plaintiff misplaces reliance on federal caselaw to argue below and on appeal that claimants have an additional burden of proof apart from that required by MCL 333.7521(1)(f). Additionally, plaintiff's arguments regarding procedural waiver are unavailing.

MCL 333.7521 governs property that is subject to forfeiture for being an aid in the violation of the state's controlled substance proscriptions. The innocent owner defense pertinent to this case is set forth in MCL 333.7521(1)(f): "To the extent of the interest of an owner, a thing of value is not subject to forfeiture under this subdivision by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent." The burden is on the owner of the property to establish this affirmative defense. *In re Forfeiture of $53*, 178 Mich App 480, 486; 444 NW2d 182 (1989).

Here, claimants filed affidavits asserting that they "had no knowledge of any criminal activity associated with any said property" and that they were innocent owners with respect to the subject properties. Plaintiff argued during the hearing on its motion for summary disposition that the claimants' statements attesting to their ignorance of their son's activities were not sufficient evidence to support the innocent owner defense. Plaintiff relies on federal caselaw holding that in order for a claimant or defendant "[t]o prevail on a defense of innocent ownership, a claimant must prove not only that it was uninvolved in and unaware of the activity

upon which forfeiture is sought, but also that it did everything that reasonably could be expected of it to prevent the activity." *United States v One 1980 Bertram 58' Motor Yacht*, 876 F2d 884, 888 (CA 11, 1989). Plaintiff's argument is misplaced because Michigan's innocent owner defense to a forfeiture action is purely statutory and not governed by federal common law or federal statute.[3]

Michigan's forfeiture statute does not require claimants do everything that reasonably could be expected to prevent the criminal activity forming the basis for forfeiture. At common law, innocent ownership was not a defense to a forfeiture action. Absent a statutory or constitutional defense, "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Calero-Toledo v Pearson Yacht Leasing Co*, 416 US 663, 683; 94 S Ct 2080; 40 L Ed 2d 452 (1974). See also *Mich ex rel Wayne Co Prosecutor v Bennis*, 447 Mich 719; 527 NW2d 483 (1994), aff'd *Bennis v Michigan*, 516 US 442; 116 S Ct 994; 134 L Ed 2d 68 (1996) (holding that knowledge or consent was not required under the nuisance abatement statute, MCL 600.3801, to forfeit the interest of an innocent coowner of an automobile used to further prostitution). These cases, however, recognize constitutional limits to the general, common-law rule that innocent ownership would not defeat a forfeiture action. The *Calero-Toledo* Court observed in dicta that "it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or

[3] The federal forfeiture statute, 18 USC 983(d)(2)(A), defines "innocent owner" as "an owner who—(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property."

consent." *Calero-Toledo*, 416 US at 689; see also *Bennis*, 447 Mich at 741. The same constitutional defense might apply to "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Calero-Toledo*, 416 US at 689. The apparent basis for the defense would be substantive due process because in the circumstances imagined, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Id*. at 689-690. Thus, the language on which plaintiff here relies arises in the context of a constitutional exception to the common-law rule that innocent ownership is not a defense to a forfeiture action. See *One Blue 1977 AMC Jeep CJ-5 v United States*, 783 F2d 759, 762 (CA 8, 1986).

MCL 333.7521(1)(f) provides in pertinent part: "To the extent of the interest of an owner, a thing of value is not subject to forfeiture under this subdivision by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent." The statute's plain terms place the burden on a claimant to affirmatively prove the so-called innocent owner defense. "[T]he forfeiture of the res is subject to the interest of a co-owner who proves that the proscribed act was done without his or her knowledge or consent, express or implied." *In re Forfeiture of $53*, 178 Mich App at 496. The statute's requirement that the claimant lack "knowledge or consent" of the acts or omission forming the basis for forfeiture means the innocent owner defense is defeated if the claimant has either knowledge of "or" consented to the illegal activity. Also, the word "knowledge" does not include the concept of constructive knowledge. *Echelon Homes*, 472 Mich at 197. Thus, an innocent owner defense would be de-

feated only by actual knowledge of the illegal activity. A claimant's consent, however, might be implied from the circumstances even without knowledge. See *In re Forfeiture of $53*, 178 Mich App 498 n 3.

In this case, because claimants asserted innocent ownership as an affirmative defense to the forfeiture action, the burden was on claimants to produce evidence that they neither had knowledge of nor consented to the illegal activity forming the basis for forfeiture. *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007); *In re Forfeiture of $53*, 178 Mich App at 496. Claimants presented evidence to support their affirmative defense, so the burden shifted back to plaintiff to produce clear and decisive evidence to negate the defense. *In re Forfeiture of $234,200*, 217 Mich App 320, 329; 551 NW2d 444 (1996). Plaintiff did not produce additional evidence to rebut claimants' asserted innocent owner defense. Rather, plaintiff relied on the documents initially submitted with the motion for summary disposition. Specifically, to show claimants' guilty knowledge plaintiff relied on police reports—inadmissible triple hearsay reporting a statement of Steven Ostipow about a statement of Gerald Ostipow.

Because the claimants filed their answer with affirmative defenses and supporting affidavits before the trial court ruled on plaintiff's motion for summary disposition, the trial court was required to consider them in deciding the motion under MCR 2.116(C)(10). "The affidavits, together with the pleadings, depositions, admissions, and documentary evidence *then filed* in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)." MCR 2.116(G)(5) (emphasis added). Moreover, plaintiff was required to support its

motion for summary disposition with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial. MCR 2.116(G)(3), (4), (6); *Maiden v Rozwood*, 461 Mich 109, 121, 123 n 5; 597 NW2d 817 (1999). Here, as discussed already, plaintiff only submitted police reports, which generally are inadmissible hearsay. MRE 801(c); MRE 802; *Maiden*, 461 Mich at 124-125. The police reports contain no admissible admissions by claimants that they possessed knowledge of the marijuana-growing operation in the house they owned. Instead, the police reports contain hearsay statements of all three claimants that Gerald Ostipow and Royetta Ostipow lacked knowledge of the marijuana-growing operation. And, to rebut claimants' assertion of innocent ownership, plaintiff relied on a purported statement by Steven Ostipow to authorities that Gerald urged Steven to get a job and not to grow marijuana. But this statement is inadmissible hearsay within hearsay as to claimants. MRE 802; MRE 805; *Maiden*, 461 Mich at 124-125. Consequently, it may not be used to support a motion for summary disposition regarding claimants' interests in the property. MCR 2.116(G)(6). "[B]oth the rules of evidence and the rules of civil procedure apply in forfeiture proceedings." *In re Forfeiture of 301 Cass Street*, 194 Mich App 381, 386; 487 NW2d 795 (1992).

Claimants not only denied the triple hearsay on which plaintiff relies but also submitted affidavits that they lacked knowledge of and did not consent to the illegal activity forming the basis for the forfeiture action. The innocent owner defense of MCL 333.7521(1)(f) requires no more. Consequently, we conclude the trial court erred by granting plaintiff's motion for summary disposition because the affidavits, pleadings, and documentary evidence then filed in the action or submitted by the parties, MCR 2.116(G)(5), the content or sub-

stance of which would be admissible as evidence at trial, MCR 2.116(G)(6), showed at a minimum that material questions of fact remained regarding claimants' innocent owner affirmative defense.

As noted already, we find plaintiff's arguments regarding procedural waiver unavailing. Plaintiff argues that the trial court could not have considered claimants' answer to the complaint that counsel filed because it was not properly before the court for the reason that counsel did not seek leave to amend claimants' original handwritten response. Further, plaintiff argues claimants' failure to raise affirmative defenses in this first pleading waived the innocent owner defense. We briefly discuss these claims.

Claimants' handwritten letter to the court, filed *in propriis personis*, was not an "answer" or a "responsive pleading"; therefore, claimants did not waive their affirmative defense of being innocent owners. The letter did not respond or answer by admitting, denying, pleading no contest to, or asserting lack of knowledge of any of the allegations in the complaint for forfeiture. MCR 2.111(C). Plaintiff repeatedly, below, on brief, and in oral argument, acknowledged that claimants' handwritten letter was not an "answer" to the forfeiture complaint. "Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.111(F)(3). But only complaints, third-party complaints, cross-claims, counterclaims, answers, and replies to answers are pleadings. MCR 2.110(A). Consequently, the claimants' handwritten letter was neither an "answer" nor a "responsive pleading" under the court rules. A party must assert its defenses to a claim in a responsive pleading, and "[a] defense not asserted in the responsive pleading or by motion as provided by

these rules is waived . . . ." MCR 2.111(F)(2). Because affirmative defenses need not be pleaded until a party files a responsive pleading, and claimants' handwritten letter was not a responsive pleading, claimants' failure to assert their innocent owner affirmative defense did not waive that defense. See *Huntington Woods v Ajax Paving Indus, Inc (On Rehearing)*, 179 Mich App 600, 601; 446 NW2d 331 (1989).

Although plaintiff might properly have entered a default in this action before claimants' counsel filed an answer on their behalf because the claimants had "failed to plead or otherwise defend as provided by these rules," MCR 2.603(A)(1), a default was not entered. Entry of default is not automatic. Rather, the facts justifying entry of default must be made known to the clerk of the court by "by affidavit or otherwise." *Id*. The court file here reflects that plaintiff did not file an affidavit in support of default. Rather, plaintiff merely represents that he sought to enter a default, but the clerk refused to enter one. Plaintiff's remedy would have been to file a motion for default, with an affidavit and brief in support, explaining why claimants' letter was not a pleading or other defense to the forfeiture action. See MCR 2.119. Additionally, because claimants' letter was not an answer to the complaint or a responsive pleading, it was unnecessary for claimants' counsel to seek leave of the court to amend it. Finally, as already discussed in considering plaintiff's motion for summary disposition under MCR 2.116(C)(10), the trial court was required to consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties . . . ." MCR 2.116(G)(5). Because such materials in this case showed at a minimum that material questions of fact remained regarding claimants' innocent

owner affirmative defense, the trial court erred in granting plaintiff summary disposition.

We reverse and remand for further proceedings consistent with this opinion. Claimants, the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

BANDSTRA, J., concurred.

O'CONNELL, P.J. (*dissenting*). I respectfully dissent.

In a forfeiture action, the burden of proof is on the claimant to establish the innocent owner defense. *In re Forfeiture of $53*, 178 Mich App 480, 486; 444 NW2d 182 (1989). To avoid forfeiture, the claimant must establish that the illegal activities that formed the basis of the forfeiture action were committed without the claimant's knowledge or consent. *Id*. at 496; MCL 333.7521(1)(f). In this case, the majority concludes that claimants' affidavits were sufficient to avoid summary disposition based on the innocent owner defense, even though the affidavits contained merely claimants' conclusory assertions that they knew nothing of their son's illegal activity. In my view, the trial court correctly determined that claimants' affidavits were insufficient to create a question of fact on the innocent owner defense. Accordingly, I would affirm the trial court's well-reasoned decision.

As this Court has repeatedly recognized, "mere conclusory allegations within an affidavit that are devoid of detail are insufficient to create a question of fact." *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 163; 721 NW2d 233 (2006), citing *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996); see also MCR 2.119(B)(1)(b). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which

reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Here, claimants' affidavits stated they had no knowledge of any criminal activity associated with their real or personal property. Neither the affidavits nor the pleadings presented any specific facts to support these statements.[1] As the trial court explained, the pleadings filed by claimants' attorney "just deny criminal activity and assert they are innocent owners, but I . . . didn't see any affirmative defenses. I don't see any answer that gives the prosecutor some basis on which to respond as to why they are innocent owners." The trial court concluded, and I agree, that claimants presented no evidence sufficient to withstand summary disposition.[2] See *Bennett v Detroit Police Chief*, 274 Mich App 307, 317-319; 732 NW2d 164 (2007) (moving party is entitled to summary disposition when nonmoving party's unsupported, speculative evidence was insufficient to create a fact issue).

I would affirm the decision of the trial court.

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[1] I recognize that it might be difficult for claimants to assert specific facts regarding innocent ownership, in light of the Saginaw County Sheriff's Department seizure of an indoor marijuana-growing operation consisting of several hundred marijuana plants, processed marijuana, drug paraphernalia, and records related to the manufacture and sale of marijuana. Nonetheless, I am of the opinion that claimants must assert some facts to establish they were unaware that several hundred marijuana plants were growing in the house.

[2] The majority states that once claimants presented evidence to support their affirmative defense, "the burden shifted back to the prosecutor to produce clear and decisive evidence to negate the defense." In my view, this statement rests on the incorrect assumption that claimants actually presented evidence. The record indicates that claimants presented conclusory assertions; they did not present facts admissible as evidence. Where, as here, a nonmoving party has the burden of proof on an issue, that party must come forward with specific facts to show a genuine factual issue. *Quinto*, 451 Mich at 362-363. If that party fails to present sufficient evidence, the burden never shifts, and the moving party is entitled to summary disposition. *Id*.

PEOPLE v BUIE (AFTER REMAND)

Docket No. 278732. Submitted October 14, 2010, at Lansing. Decided January 11, 2011, at 9:10 a.m.

James Henry Buie was convicted after a jury trial in the Kent Circuit Court, Dennis B. Leiber, J., of two counts of first-degree criminal sexual conduct involving a victim under the age of 13, three counts of first-degree criminal sexual conduct involving the use of a weapon, and possession of a firearm during the commission of a felony. Defendant appealed, alleging, in part, that he was deprived of his constitutional right to confront the witnesses against him when the court allowed two nonvictim prosecution witnesses to testify by way of two-way, interactive video technology. The Court of Appeals, BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ., held the record was insufficient to determine whether the procedure was necessary to further an important public policy or state interest, and remanded to the trial court for further fact-finding. 285 Mich App 401 (2009). Both parties sought leave to appeal in the Supreme Court, but both applications were denied, and the Supreme Court further instructed the trial court to make findings regarding the good-cause and consent requirements of MCR 6.006(C). 485 Mich 1105 (2010). At the evidentiary hearing on remand, the proofs showed that both witnesses would have testified in person had the video technology not been available, although it would have been inconvenient. Defense counsel testified that the video testimony was the best way to have the two witnesses testify because the case had already proceeded slowly and that the technology allowed her to effectively cross-examine them. She testified that defendant objected to the use of the video technology and that he had been uncooperative throughout the proceedings in general. The court issued an opinion and order holding that there was no error in permitting the video procedure because it furthered several state interests or public policies and defendant consented to the procedure.

After remand, the Court of Appeals *held*:

1. An accused person has a constitutional right to confront the witnesses against him or her under US Const, Am VI and Const 1963, art 1, § 20. When determining whether the right of confrontation would be infringed by permitting testimony by means of

two-way, interactive video technology, a trial court must hear evidence and make case-specific findings that the use of such technology is necessary to further a public policy or state interest important enough to outweigh the defendant's right of confrontation and that it preserves all the other elements of the Confrontation Clause. The state interests cited by the trial court—convenience, cost savings, efficiency, and avoiding delay—did not constitute interests important enough to outweigh defendant's right of confrontation.

2. Under MCR 6.006(C), a court may take trial testimony by way of two-way, interactive video technology when the defendant is present in the courtroom or has waived the right to be present if there is a showing of good cause and the parties consent. Defense counsel may waive a defendant's right of confrontation, but only if the waiver is a legitimate trial tactic or strategy and the defendant does not object to the decision. Although defense counsel agreed to the use of the technology, defendant objected to it and had counsel place his objection on the record. The trial court erred in concluding that defendant had consented through his counsel's assent to using the technology. Because the challenged testimony was highly relevant to establishing the essential element of identity, the error warrants reversal.

Reversed and remanded for a new trial.

WHITBECK, J., concurring, emphasized the importance of, and the historical basis for, adherence to the constitutional requirement that an accused has the right to confront the witnesses against him or her.

1. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — TRIAL — WITNESSES — TWO-WAY, INTERACTIVE VIDEO TECHNOLOGY.

An accused person has a constitutional right to confront the witnesses against him or her; when determining whether the right of confrontation would be infringed by permitting testimony by means of two-way, interactive video technology, a trial court must hear evidence and make case-specific findings that the use of such technology is necessary to further a public policy or state interest important enough to outweigh the defendant's right of confrontation and that it preserves all the other elements of the Confrontation Clause (US Const, Am VI; Const 1963, art 1, § 20).

2. TRIAL — WITNESSES — TESTIMONY — TWO-WAY, INTERACTIVE VIDEO TECHNOLOGY.

A court may take trial testimony by way of two-way, interactive video technology when the defendant is present in the courtroom

> or has waived the right to be present if there is a showing of good cause and the parties consent; defense counsel may waive a defendant's right of confrontation, but only if the waiver is a legitimate trial tactic or strategy and the defendant does not object to the decision (MCR 6.006[C]).

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jonathan Sacks*) for defendant.

AFTER REMAND

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM. Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC) involving a victim under the age of 13, MCL 750.520b(1)(a), three counts of first-degree CSC involving the use of a weapon, MCL 750.520b(1)(e), and possession of a firearm during the commission of a felony, MCL 750.227b. When defendant first appealed to this Court, he argued that the trial court erred in permitting Dr. Vincent Palusci and Rodney Wolfarth to testify by way of two-way, interactive video technology. Specifically, defendant argued that the testimony violated his constitutional right of confrontation and was not properly admitted under any state statute or court rule. Retaining jurisdiction, we remanded for the trial court to determine whether permitting the video procedure was necessary to further an important public policy or state interest. *People v Buie*, 285 Mich App 401, 418; 775 NW2d 817 (2009). Our Supreme Court denied plaintiff and defendant leave to

appeal, but instructed the trial court to also "make findings regarding good cause and consent pursuant to MCR 6.006(C)" on remand. *People v Buie*, 485 Mich 1105, 1106 (2010). Following an evidentiary hearing, the trial court issued an opinion and order holding that there was no error in permitting the video procedure because it furthered several state interests or public policies and defendant consented to the procedure. We disagree with the trial court's holding. Because permitting the video procedure cannot be deemed harmless error, we must vacate defendant's convictions and sentence and remand for a new trial.

I

Defendant was convicted of sexually assaulting BS and minors LS, age 13, and DS, age 9. According to the testimony at trial, on June 27, 2001, defendant held BS at gunpoint in a closet, penetrated her vagina with his penis, and attempted to penetrate her anally. Defendant subsequently penetrated LS's vagina with his penis and attempted to penetrate her anally. He then penetrated DS's vagina with his penis. At trial, BS identified defendant as the man who assaulted her, LS, and DS. She testified that she had never seen him before the night of the assaults and had not seen him since that night. LS and DS were unable to identify the man who assaulted them.

Dr. Palusci examined LS and DS within hours of the assaults, Wolfarth conducted DNA testing on the swabs collected by Dr. Palusci, as well as other evidence, and both testified regarding their findings. As we detailed in our earlier opinion:

> Dr. Vincent Palusci examined LS and DS approximately six hours after the assaults. Dr. Palusci testified that his findings "were indicative of sexual conduct of direct

trauma to the genitals, and in the case of [LS], also her anus, which were not explainable in any other manner than the histories provided" by the girls. Christine Dunnick, a forensic nurse, examined BS after the assaults and found a "half a centimeter perianal tear, which is near the anal opening," consistent with the history provided by BS. Dr. Palusci and nurse Dunnick collected evidence, including vaginal and rectal swabs, during the examinations and placed the evidence in rape kits. The kits were then sealed and released to the appropriate law enforcement agencies.

The trial court designated Rodney Wolfarth as an expert in the area of DNA analysis. Wolfarth conducted DNA testing on the swabs in the rape kits and the nightgown worn by LS during the assaults, as well as a fitted sheet, a pillowcase, and cigarette butts found at the scene. Wolfarth testified that he found sperm cells in the vaginal and rectal swabs taken from LS. When he tested the sperm cells from the rectal swab, "it was consistent with a mixture and the mixture was consistent with [LS] and an unknown semen donor, designated as Donor 1." Wolfarth found the same mixture on the nightgown and found DNA from Donor 1 on the fitted sheet, pillowcase, and cigarette butts. Wolfarth was unable to identify a match for the DNA at that time, but stated that once DNA testing is completed, the "probative DNA result is entered into what is a DNA data bank called CODIS, which stands for Combined DNA Indexing System." The data are stored to allow for comparisons to convicted felons' profiles at a later date. When a match is made between a DNA sample and a known profile, it is referred to as a CODIS hit.

At trial, prosecution witness LB testified that defendant sexually assaulted her in 2004, when she was 13 years old. LB told her sister that defendant had assaulted her and, shortly thereafter, the incident was reported to the police. DNA analysts subsequently determined that defendant's DNA matched sperm cells from LB's vaginal swab and underwear. The results of the DNA testing were entered into CODIS.

On February 1, 2005, a CODIS hit occurred when the system matched defendant's DNA to the DNA samples taken in this case. Thereafter, a search warrant to conduct

> a buccal swab for defendant's DNA was obtained. Defendant was initially uncooperative, but eventually consented to the swab. Joel Schultze, who was designated by the trial court as an expert in DNA analysis, testified that the DNA sample was tested and compared to Wolfarth's previous findings. According to Schultze, the DNA material on the nightgown, pillowcase, fitted sheet, and cigarette butts were [sic] consistent with defendant's DNA. In addition, the rectal swab taken from LS was consistent with a mixture of LS and defendant at 10 of 13 locations. Defendant's DNA was not found on any of the swabs taken from DS, but Schultze explained that even if penetration occurs, "if there's no ejaculation, the male DNA is not going to be there." [*Buie*, 285 Mich App at 404-406.]

The trial court permitted Dr. Palusci and Wolfarth to testify by way of two-way, interactive video technology. Before the first witness testified, defense counsel stated: "[M]y client has—wanted to question the veracity of these proceedings, so I'll leave that to the Court's discretion."

Following his jury trial, defendant was convicted as previously stated. He then appealed his convictions and sentence in this Court, arguing that Dr. Palusci's and Wolfarth's video testimony violated his constitutional right of confrontation and was not properly admitted under any state statute or court rule. We adopted the test articulated in *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990), to determine whether a trial court infringes on a defendant's right of confrontation when it allows witness testimony to be taken by way of two-way, interactive video technology. *Buie*, 285 Mich App at 415. We held that a "trial court must hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it pre-

serves all the other elements of the Confrontation Clause." *Id*. Additionally, we held that

> [p]ursuant to the plain language of MCR 6.006(C)(2), a trial court may take witness testimony by two-way, interactive video technology if: (1) the defendant is either present in the courtroom or has waived the right to be present, (2) there is a showing of good cause, and (3) the parties consent. [*Id*. at 417.]

Based on the record before us at the time, we could not determine that there was a showing of good cause or that defendant consented. *Id*. We remanded the case, ordering the trial court to determine whether permitting the video procedure was necessary to further an important public policy or state interest. *Id*. at 418. Defendant subsequently filed an application for leave to appeal in the Supreme Court. The Supreme Court denied the application, but instructed the trial court to also "make findings regarding good cause and consent pursuant to MCR 6.006(C)." *Buie*, 485 Mich at 1106.

On remand, the trial court held an evidentiary hearing. The parties stipulated that at the time of trial, Dr. Palusci worked at Wayne State University in Detroit, Michigan and Wolfarth worked at the Virginia State Crime Lab in the western part of Virginia. Although it would have been inconvenient, both witnesses would have testified in person if videoconferencing had not been available.

The prosecutor assigned to this case at the time of trial testified that although he and defense counsel discussed the use of the video technology, he could not recall the specifics of their discussions. He recalled informing defense counsel that testifying in person would be inconvenient for Dr. Palusci and Wolfarth. He also recalled defense counsel stating that she believed Dr. Palusci's testimony would be damaging to the

defense and wanted the testimony to be "done with as quickly as possible." The prosecutor testified that he would never arrange for a witness to testify by way of video technology without first obtaining a stipulation from defense counsel. Defendant was not included in the prosecutor's discussions with defense counsel.

Defendant's trial counsel testified that she discussed the use of the video technology with the prosecutor and the trial court in chambers before trial. She testified that this case had proceeded very slowly for a number of reasons. She understood that it would be problematic and time consuming for Dr. Palusci and Wolfarth to testify in person, although not impossible, and agreed with the prosecutor that utilizing the technology "would be the best way to have these individuals testify without subjecting them to being here physically." Defense counsel testified that because of the nature of the witnesses' testimony, and her ability to cross-examine them effectively by way of the technology available, she had no reason to object to its use.

Defense counsel further testified that she discussed the video technology with defendant before the witnesses testified, despite the fact that he had been uncooperative with her and the proceedings in general. According to defense counsel, although she did not personally object to the use of the technology, defendant "objected to everything." Whenever he objected to something, she placed an objection on the record on his behalf, and she specifically "made a statement on the record indicating [his] disdain for the two individuals testifying via video." When asked whether her statement at trial that her client "wanted to question the veracity of these proceedings" was an expression of defendant's objection to the use of the technology, she testified: "Absolutely." She explained that defendant

"had a problem with every piece of this case." She did not believe that he had a problem with the technology in particular, but that "he had a problem with the fact that he was on trial for raping two little girls," although she could not "get into his mind."

Defendant testified that defense counsel informed him of the video testimony immediately before it took place. Defendant told counsel that it "didn't feel right" to have witnesses testify from outside of the courtroom and requested that she object. In response to his request, counsel made the statement regarding defendant questioning the veracity of the proceedings.

After the evidentiary hearing, the trial court issued a written opinion and order holding that there was no error in permitting the witnesses' video testimony. The court held that there were "state interests or public policies" justifying the use of the video technology in this case. Additionally, the court held that there was good cause for utilizing the technology and that "defendant ultimately consented to the video testimony" under MCR 6.006(C). The court explained that defense counsel had consented to the use of the technology before trial, that when counsel stated that her client "wanted to question the veracity of these proceedings, so I'll leave that to the Court's discretion," defendant was actually agreeing—through counsel—to the use of the technology, and that defendant's "intent was to object to the proceedings in general because he disliked being prosecuted."

Having retained jurisdiction, we now have this case before us to review the trial court's findings on remand and the record as supplemented.

II

On appeal, defendant argues that the trial court erred in permitting Dr. Palusci and Wolfarth to testify

by way of the two-way, interactive video technology. According to defendant, the testimony violated his constitutional right of confrontation and was not properly admitted under any state statute or court rule. As we stated in our earlier opinion, because defendant failed to object to the use of the video technology on the grounds he raises on appeal, the issue is unpreserved. *Buie*, 285 Mich App at 407, citing *People v McPherson*, 263 Mich App 124, 137; 687 NW2d 370 (2004). Therefore, our review is for plain error. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id*. at 763 (citations omitted).]

We review the trial court's factual findings on remand for clear error, *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000), and its rulings on questions of constitutional law de novo, *People v Bryant*, 483 Mich 132, 138; 768 NW2d 65 (2009). To the extent the court engaged in interpretation of MCR 6.006(C), our review is de novo. See *Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 553; 652 NW2d 851 (2002).

III

In our earlier opinion, we adopted the test articulated in *Craig*, 497 US 836, to determine whether a defen-

dant's constitutional right of confrontation is infringed when testimony is permitted to be taken by way of two-way, interactive video technology. *Buie*, 285 Mich App at 415. Pursuant to the two-prong *Craig* test, we held that a trial court must hear evidence and make case-specific findings that the use of such technology is necessary to further a public policy or state interest important enough to outweigh the defendant's right of confrontation and that it preserves all of the other elements of the Confrontation Clause. *Id*. On remand, the trial court held that, given the nature of the witnesses' testimony, the size of the screen on which the witnesses appeared, and the parties' ability to effectively question the witnesses, there were "state interests or public policies" justifying the use of the video technology in this case, specifically cost savings, efficiency, the convenience of the witnesses, and avoiding delay.

Defendant argues that the trial court erred in concluding that there were public policies or state interests at issue that were important enough to outweigh his constitutional right of confrontation. The prosecution does not refute this argument. In its proposed findings of fact, filed after the evidentiary hearing on remand, the prosecution conceded that it "presented no specific state interest invoked for having Dr. Palusci and Mr. Wolfarth testify via video rather than in person. Rather, it was done for convenience, but only after an agreement was reached with defense counsel . . . ." In its supplemental brief on appeal, the prosecution again conceded that it did not present "a 'public policy or state interest' in having [the witnesses] testify by video." It further stated: "The trial court's findings of fact after the hearing on remand identified the cost and expense as important public policies and state inter-

ests. . . . We are not arguing that those interests override a true constitutional mandate . . . ."[1]

Additionally, we note that the trial court failed to separate the two prongs of the *Craig* test in reaching its conclusion. At both the evidentiary hearing on remand and in its written opinion and order, the court emphasized the parties' ability to question the witnesses and the jury's ability to see and hear the witnesses on the video screen. In doing so, the court addressed the *second* prong of the *Craig* test, which is that the video technology utilized adequately protected the elements of the Confrontation Clause other than the element of physical presence, i.e., the oath, cross-examination, and the ability of the trier of fact to view the demeanor of the witness. See *Buie*, 285 Mich App at 408, 415. Importantly, however, the trial court did not explain how the particular interests it cited, i.e., cost savings, efficiency, the convenience of the witnesses, and avoiding delay, constituted public policies or state interests important enough to outweigh defendant's right to confrontation under the *first* prong of the *Craig* test. As we described in our earlier opinion, this Court has held that the right to confrontation must, under certain circumstances, give way to important interests such as protecting a victim witness from being traumatized. See, e.g., *People v Pesquera*, 244 Mich App 305, 312-313; 625 NW2d 407 (2001), and *People v Burton*, 219 Mich App 278, 289; 556 NW2d 201 (1996). Here, the trial court failed to articulate how the interests it cited were equally important.

Considering that neither party appears to agree with the trial court's conclusion on this issue, and the court's

[1] Alternatively, the prosecution argued that the interests cited by the trial court constituted "good cause" for permitting video testimony under MCR 6.006(C).

failure to properly address the first prong of the *Craig* test in reaching its conclusion, we decline to hold that there was a public policy or state interest at issue in this case important enough to outweigh defendant's right of confrontation.

IV

Aside from finding a public policy or state interest important enough to outweigh a defendant's constitutional right to confrontation, a trial court may utilize two-way, interactive video technology to take trial testimony under MCR 6.006(C).[2] Pursuant to the plain language of the court rule, a court may take trial testimony by way of such technology "if: (1) the defendant is either present in the courtroom or has waived the right to be present, (2) there is a showing of good cause, and (3) the parties consent." *Buie*, 285 Mich App at 417. Based on the record before us when we issued our earlier opinion, we could not determine that there was a showing of good cause or that defendant consented to the use of the video technology in this case. *Id*. Pursuant to the Supreme Court's order, the trial court considered the issue on remand. The trial court held that good cause to utilize the video technology existed and that defendant consented to its use through counsel.

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[2] MCR 6.006(C) provides, in relevant part:

> As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following proceedings:
>
> * * *
>
> (2) with the consent of the parties, trials. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

Even if good cause could be established in this case, we disagree with the trial court on the issue of consent. In our earlier opinion, we noted the rule articulated in *People v Lawson*, 124 Mich App 371; 335 NW2d 43 (1983), that the "integral elements of the Confrontation Clause, including seeing the witness's demeanor, 'must be personally waived by the defendant.' " *Buie*, 285 Mich App at 418, citing and quoting *Lawson*, 124 Mich App at 376. Because the *Lawson* Court ultimately held that the error in the case was harmless, the personal waiver rule articulated by that panel is dictum and is, therefore, not binding. As the prosecution points out, a majority of the federal courts of appeals and state courts that have considered whether defense counsel may waive a defendant's constitutional right of confrontation have held that counsel may waive the defendant's right. See *State v Campbell*, 208 Ill 2d 203, 212-217; 802 NE2d 1205 (2003), and the cases cited therein. It is crucial to note, however, that the courts that have reviewed this issue have overwhelmingly held that defense counsel may only waive a defendant's right of confrontation if the waiver is a legitimate trial tactic or strategy *and* the defendant does not object to the decision. See *id*. We find the reasoning of the majority of the federal and state courts that have reviewed this issue to be persuasive.[3]

Additionally, aside from the constitutional right of confrontation implicated in this case, MCR 6.006(C)

[3] We note that in stating that "the more integral rights of the confrontation clause must be personally waived by the defendant," *Lawson*, 124 Mich App at 376, the *Lawson* Court relied on *Brookhart v Janis*, 384 US 1, 7-8; 86 S Ct 1245; 16 L Ed 2d 314 (1966), which held that defense counsel may not "waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him" over the defendant's expressed desire to the contrary.

does not permit defense counsel to consent to the use of two-way, interactive video technology where a defendant objects to the procedure. MCR 6.006(C)(2) provides that a court may take trial testimony by way of such technology "with the consent of the parties." MCR 6.003(1) indicates that the term "[p]arty," as used in MCR 6.006, "includes the lawyer representing the party." Thus, the term "parties" in MCR 6.006(C)(2) encompasses both the lawyer and the client that the lawyer represents. While it may be permissible for a lawyer to consent to the use of two-way, interactive video technology on behalf of his or her client, we cannot interpret MCR 6.006(C)(2) to mean that the lawyer may consent to the use of such technology over the express objection of the client.

In this case, the trial court held that defendant consented to the video procedure through counsel. Indeed, defense counsel testified at the evidentiary hearing on remand that she initially agreed to the use of the technology, she had no reason to object to its use, and she never personally objected. But counsel further testified that defendant expressed disagreement with the use of the technology and requested that she object, and that her statement at trial that her client "wanted to question the veracity of these proceedings, so I'll leave that to the Court's discretion," was "[a]bsolutely" an expression of defendant's objection to the use of the technology. Defense counsel later explained that she believed defendant asked her to object, not because he had a problem with the technology in particular, but because he had a problem with being on trial in general. We note, however, as did defense counsel herself, that this was merely counsel's opinion regarding the reason for defendant's objection, as she could not "get into his mind." Defendant testified at the evidentiary hearing that he asked defense counsel to object to the use of the

video technology because it "didn't feel right" to have witnesses testify from outside of the courtroom. Moreover, MCR 6.006(C)(2) specifically states that "[a] party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting."

Given the testimony of both defendant and defense counsel at the evidentiary hearing on remand, we cannot conclude that defendant consented to the video procedure through counsel. To the contrary, defendant objected to the use of the technology and had counsel place his objection on the record. Because defendant expressly objected to the use of the technology, defense counsel's agreement with its use does not qualify as a waiver of defendant's constitutional right of confrontation or as consent under MCR 6.006(C)(2). Accordingly, we hold that the trial court plainly erred in permitting Dr. Palusci and Wolfarth to testify by way of two-way, interactive video technology at trial.

V

Finally, we must determine whether the trial court's error in permitting Dr. Palusci's and Wolfarth's video testimony warrants reversal. Reversal is warranted when plain, forfeited error resulted in the conviction of an actually innocent defendant or "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, 460 Mich at 763 (edits, quotation marks, and citation omitted). This requirement "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

Dr. Palusci testified that he swabbed the minor victims for DNA evidence. Wolfarth testified that he conducted the initial DNA testing on the swabs collected by Dr. Palusci and other pieces of evidence collected from the scene to establish the presence of "Donor 1's" DNA. Wolfarth explained that when he tested the sperm cells from LS's rectal swab, it was consistent with a mixture of LS's DNA and the DNA of an unknown semen donor, designated as Donor 1. Wolfarth also found DNA from Donor 1 on some of the other evidence collected from the scene. We find that without this foundational testimony, the prosecution could not have established a chain of custody, explained the CODIS hit that occurred when the system matched defendant's DNA to Donor 1's DNA, or presented Schultze's testimony comparing defendant's DNA to Wolfarth's findings. Schultze explained that defendant's DNA was consistent with the DNA previously designated by Wolfarth as Donor 1's DNA.

Although BS identified defendant as the man who assaulted her, LS, and DS, she testified that she had never seen defendant before the night of the assaults and had not seen him since that night. LS and DS were unable to identify the man who assaulted them. Thus, the testimony of Dr. Palusci and Wolfarth, which was foundational to Schultze's testimony linking defendant to the assault on LS and the scene of the crime, was highly relevant to establishing the essential element of identity in this case. Considering the importance of the challenged testimony, we must conclude that the trial court's error in utilizing the video technology at issue " 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings' independent of the defendant's innocence," *id*. (citation omitted), and, therefore, warrants reversal.

We vacate defendant's convictions and sentence and remand for a new trial. We do not retain jurisdiction.

WHITBECK, J. (*concurring*). I concur in the majority's scholarly opinion. I write separately only to emphasize the importance of, and the historical basis for, adherence to the constitutional requirement that an accused has the right to confront the witnesses against him.[1]

For a wide variety of reasons, our jurisprudence contains an interlocking web of rights and restrictions, all aimed at protecting those whom the state accuses of crimes. We require that when investigation turns to custodial interrogation, the police must inform the subject of that interrogation that he or she has the rights to remain silent and to the services of an attorney.[2] And there is a constitutional prohibition against unreasonable search and seizure.[3] Further, a criminal defendant has a constitutional right to a public trial by an impartial jury.[4] That defendant has a constitutional right against compelled self-incrimination and a concomitant presumption of innocence.[5] He or she has a constitutional due process right to be convicted only upon prosecutorial proof of guilt beyond a reasonable doubt,[6] a right to a unanimous jury verdict,[7] a constitu-

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[1] US Const, Am VI; Const 1963, art 1, § 20.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] US Const, Am IV; Const 1963, art 1, § 11.

[4] US Const, Am VI; Const 1963, art 1, § 20.

[5] *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995), citing US Const, Am V; Const 1963, art 1, § 17.

[6] *Sandstrom v Montana*, 442 US 510, 520-524; 99 S Ct 2450; 61 L Ed 2d 39 (1979).

[7] *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994), citing US Const, Am VI; Const 1963, art 1, § 14; FR Crim P 31(a); and MCR 6.410(B).

tional right to compulsory process,[8] and a constitutional right to effective assistance of counsel.[9]

These protections continue even after conviction. In Michigan, a criminal defendant has an absolute right of appeal following conviction[10] and to the reasonable assistance of counsel in perfecting and prosecuting such an appeal.[11] Conversely, the prosecution has no constitutional right to appeal.[12]

Thus, the right at issue in this case, the constitutional "confrontation clause"[13] as it is popularly called, is only one strand in this interlocking web of rights and restrictions. But it is an important strand and one steeped in history. "The right to confront one's accusers is a concept that dates to Roman times."[14] The origins of the clause itself go back to the sixteenth and seventeenth centuries. During that time, the English Crown "used criminal proceedings as weapons against its political enemies," most notoriously through the device of the Star Chamber.[15] Essentially, the English courts used an inquisitorial mode of criminal procedure in which, for example, "justices of the peace would interrogate witnesses pri-

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[8] Const 1963, art 1, § 20.

[9] *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994).

[10] Const 1963, art 1, § 20.

[11] *Id.*

[12] *People v Richmond*, 486 Mich 29, 36; 782 NW2d 187 (2010).

[13] US Const, Am VI; Const 1963, art 1, § 20.

[14] *Crawford v Washington*, 541 US 36, 43; 124 S Ct 1354; 158 L Ed 2d 177 (2004), citing *Coy v Iowa*, 487 US 1012, 1015; 108 S Ct 2798; 101 L Ed 2d 857 (1988), and Herrmann & Speer, *Facing the accuser: Ancient and medieval precursors of the Confrontation Clause*, 34 Va J Int'l L 481 (1994).

[15] Counseller & Rickett, *The Confrontation Clause after Crawford v Washington: Smaller mouth, bigger teeth*, 57 Baylor L R 1, 7 (2005).

vately and offer the testimony against the accused at trial without calling the witness to the stand."[16]

The 1603 trial of Sir Walter Raleigh provides perhaps the most well-known instance of the potential for abuse inherent in the inquisitorial mode.[17] The main witness against Raleigh never testified in person at the trial.[18] Rather, officers reported his statements in court.[19] Raleigh objected to the use of these out-of-court statements—saying at one point, "Good my Lords, let my accuser come face to face and be deposed"[20]—but his objections were unsuccessful, and he was convicted and executed.[21]

Rather clearly, Raleigh's trial demonstrates the twin evils caused by the inability to confront witnesses:

> First, without confrontation by cross-examination, the accused is unable to test the credibility of the declarant's testimony. Confrontation by cross-examination is needed to ensure the reliability of testimony. Second, without a right to confrontation the government may develop ex parte testimony for use against the accused at trial. The right to confrontation serves as a check on the government's ability to secretly develop evidence against its citizenry, a worthwhile purpose, irrespective of the reliability of the testimony.[22]

The proposed Federal Constitution did not originally contain a confrontation clause. But the First Congress included the clause in the proposal that became the Sixth Amendment.[23] Early state decisions indicated

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[16] *Id.*

[17] *Crawford*, 541 US at 44; Counseller & Rickett, 57 Baylor L R at 7-8.

[18] *Crawford*, 541 US at 44; Counseller & Rickett, 57 Baylor L R at 7.

[19] *Crawford*, 541 US at 44; Counseller & Rickett, 57 Baylor L R at 7.

[20] 1 Criminal Trials 389-520, 427 (David Jardine ed, 1850).

[21] *Crawford*, 541 US at 44; Counseller & Rickett, 57 Baylor L R at 7-8.

[22] Counseller & Rickett, 57 Baylor L R at 8.

[23] *Crawford*, 541 US at 49.

that the right to cross-examine witnesses in person was at the core of the original understanding of the clause.[24] And subsequent United States Supreme Court decisions followed this understanding:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.[25]

Indeed, as Justice Scalia opined, the "text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts."[26]

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[24] *Id.* at 49-50, citing *State v Webb*, 2 NC 103, 104 (1794), to the effect that, " '[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine,' " and *State v Campbell*, 30 SCL 124, 125 (1844) to the effect that one of the " 'indispensable conditions' implicitly guaranteed by the State Constitution was that 'prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination.' "

[25] *Crawford*, 541 US at 61; see also *Mattox v United States*, 156 US 237, 244; 15 S Ct 337; 39 L Ed 409 (1895) ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . .").

[26] *Crawford*, 541 US at 54.

But technology has intruded and public policy concerns have surfaced. In *Maryland v Craig*,[27] the United States Supreme Court faced the question whether the confrontation clause categorically prohibited a child witness in a child abuse case from testifying against a defendant at trial outside the defendant's physical presence, by one-way closed-circuit television. A majority of the Court held that there was no such categorical prohibition.[28] The majority adopted a two-pronged test to determine if allowing a child witness's testimony outside the defendant's physical presence by one-way closed-circuit television in a sexual abuse case violated the Confrontation Clause. The Court delineated four elements of the Confrontation Clause: (1) physical presence, (2) an oath, (3) cross-examination, and (4) "observation of demeanor by the trier of fact."[29] In conjunction with these elements, the first prong of the *Craig* test is whether there is a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation.[30] And the second prong is whether the procedure in question preserves all the other elements of the Confrontation Clause.[31]

Notably, Justice Scalia, joined by Justice Brennan, Justice Marshall, and Justice Stevens, dissented.[32] Justice Scalia asserted that the rule that a "defendant

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[27] *Maryland v Craig*, 497 US 836, 840; 110 S Ct 3157; 111 L Ed 2d 666 (1990).

[28] See *id.* at 844 ("We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with the witnesses against them at trial.") and *id.* at 847 ("[W]e have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant.").

[29] *Id.* at 846.

[30] *Id.* at 851-852, 855.

[31] *Id.*

[32] *Id.* at 860-870 (Scalia, J., dissenting).

should be confronted by the witnesses who appear at trial is not a preference 'reflected' by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed."[33] Justice Scalia went on to say:

> The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.[34]

In our prior opinion in this case,[35] we noted that, like the United States Supreme Court in *Craig*, this Court has recognized that presenting testimony over closed-circuit television does not violate the defendant's right of confrontation in two special circumstances.[36] We analyzed a number of federal decisions and then went on to adopt the *Craig* test:

> Like the majority of federal courts that have examined this issue, we adopt the *Craig* test to determine whether a trial court infringes a defendant's right of confrontation when it allows witness testimony to be taken through two-way, interactive video technology. The trial court must hear evidence and make case-specific findings that the

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[33] *Id.* at 863.

[34] *Id.* at 870.

[35] *People v Buie*, 285 Mich App 401; 775 NW2d 817 (2009).

[36] *Id.* at 409, citing *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001), and *People v Burton*, 219 Mich App 278, 290-291; 556 NW2d 201 (1996).

> procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it preserves all the other elements of the Confrontation Clause.[37]

While I see considerable intellectual merit in Justice Scalia's absolutist view of the confrontation clause—after all, the document does say, "In *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"[38]—I believe that our decision to adopt the *Craig* test in our prior opinion was a prudential one, given the prior decisions in *Burton* and *Pesquera*, and the precedent in *Craig* itself.

I also find significant that the prosecution concedes that in this case there was no public policy or state interest in having the witnesses in question testify by video. Therefore, despite the trial court's conclusory statements to the contrary, there is no basis on the record on which we could ground a holding that there was a public policy or state interest sufficiently important to outweigh Buie's constitutionally guaranteed right of confrontation. Further, although Buie's *counsel* may have consented to the video procedure pursuant to MCR 6.006(C)(2), she did so over Buie's express objection. Manifestly, then, it was plain error to permit the two witnesses in question to testify using the video procedure.

I fully recognize that the crimes in question here—criminal sexual conduct involving a victim under the age of 13,[39] three counts of criminal sexual conduct involving the use of a weapon,[40] and one count of

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[37] *Id.* at 415.

[38] US Const, Am VI (emphasis added).

[39] MCL 750.520b(1)(a).

[40] MCL 750.520b(1)(e).

possession of a firearm during the commission of a felony[41]—are heinous ones. I further recognize that there was substantial evidence of Buie's guilt in this matter and that the video testimony of the two witnesses in question was crucial to establishing that guilt. And I finally recognize that others may assert that we base our decision to vacate Buie's convictions and sentence upon "technicalities."

But, while it is true that the Constitution is not a suicide pact,[42] it is also not a wish list. Nor can we modify it in lockstep with evolving technology. The words in our most fundamental formative documents have continuing meaning and it is our responsibility as members of the judiciary to ensure that such meaning has effective life. The web of protection that we have woven around those whom the state accuses, or may accuse, of crimes is at the center of our system of justice. It is one of the safeguards that distinguish that system from those despotic and tyrannical regimes in which political prosecutions and governmentally orchestrated sham trials are commonplace. A criminal defendant's right to confront witnesses face to face and to subject such witnesses to the test of cross-examination is not a technicality, it is crucial protection that has been with us almost from the very beginning of our republic. It may be waived, as MCR 6.006(C)(2) provides, but it cannot be judicially abrogated. Raleigh's ghost haunted the Framers and he haunts us still, to our great benefit.

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[41] MCL 750.227b.

[42] See *Terminiello v Chicago*, 337 US 1, 37; 69 S Ct 894; 93 L Ed 1131 (1949) (Vinson, J., dissenting).

KAR v NANDA

Docket No. 292754. Submitted November 4, 2010, at Lansing. Decided January 13, 2011, at 9:00 a.m.

Anshuman Kar filed suit for a divorce from Sunaina Nanda in the Washtenaw Circuit Court. Defendant moved for dismissal, arguing that the court lacked subject-matter jurisdiction because neither party had resided in Michigan for 180 days immediately preceding the filing of the complaint, as required by MCL 552.9(1). Plaintiff traveled for work and did not live in any area of the country for long. Defendant lived in Ann Arbor at the time plaintiff filed for divorce, but was a citizen of India and she intended to return there when she finished graduate school. Her temporary student visa was to expire on April 20, 2012. The court, Nancy C. Francis, J., held that it had jurisdiction because defendant had resided in Michigan for the required 180 days and the statute did not contain a requirement that she intend to maintain future residency in Michigan. Defendant appealed.

The Court of Appeals *held*:

Although the ordinary, common meaning of the term "reside" does not require an intent to remain permanently or indefinitely, "resided," as used in MCL 552.9(1), is interpreted as "residence" and defined as "a place of abode accompanied with the intention to remain." "Intention to remain" does not mean a commitment to stay permanently or indefinitely, but only that a person reside in an area permanently enough to have legal relations and responsibilities. Because defendant lived in Michigan for years before the suit was filed, intended to remain until her studies were complete, and consistently held long-term leases for housing while she lived in the state, she resided in Michigan for the requisite period under MCL 552.9(1), and the trial court had jurisdiction over the parties' divorce.

Affirmed.

DIVORCE — JURISDICTION — RESIDENCY — INTENTION TO REMAIN.

"Resided," as used in MCL 552.9(1), is interpreted as "residence" and defined as "a place of abode accompanied with the intention to remain"; "intention to remain" does not mean a commitment to

> stay permanently or indefinitely, but only that a person reside in an area permanently enough to have legal relations and responsibilities.

Law Offices of Blake P. Lipman (by *Blake P. Lipman*) for plaintiff.

The Law Firm of John F. Schaefer (by *B. Andrew Rifkin*) for defendant.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

SAAD, J. In this divorce action, defendant Sunaina Nanda appeals an order that denied defendant's motion to dismiss for lack of subject-matter jurisdiction. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Defendant maintains that the circuit court lacks subject-matter jurisdiction because, pursuant to MCL 552.9(1), a court "shall not" grant a judgment of divorce unless the complainant or defendant "has resided in this state for 180 days immediately preceding the filing of the complaint," and according to defendant, neither party meets this residency requirement. The record reflects that plaintiff and defendant are both citizens of India and they married there in 2007. In 2009, while living in Atlanta, Georgia, plaintiff filed the complaint for divorce in Washtenaw County. Plaintiff travels for work and does not live in any area of the country for long. Defendant lived in Ann Arbor when plaintiff filed for divorce, but she denies that she is a "resident" of Ann Arbor because she plans to return to India when she finishes graduate school at the University of Michigan. Defendant's temporary student visa expires on April 30, 2012.

The trial court ruled that it has jurisdiction over the divorce action pursuant to MCL 552.9(1) because defendant lived in Michigan for the required 180 days. The court opined:

> Here, the critical term is "resided," rather than "resident" or ["]residence." It is retrospective. The statute does not contain any requirement of intent to maintain residency in the future. It merely requires that one or the other party must have "resided" (past tense) in Michigan for 180 days, and in the county, for 10 days, prior to any filing for divorce in any Michigan county.

The trial court cited *Kubiak v Steen*, 51 Mich App 408; 215 NW2d 195 (1974), in which this Court interpreted a venue provision in the Child Custody Act, and observed that our courts have construed the term "reside" in both a technical, legal sense of a legal domicile, as well as a commonly understood sense of mere physical presence or place of abode. The court concluded that it would be contrary to the intent of the Legislature to apply a narrow, technical interpretation of the term when the statute itself gives no indication that it was intended to preclude those who have lived in Michigan for 180 days from seeking a divorce in this state.

II. ANALYSIS

The question whether a court has subject-matter jurisdiction is a question of law that we review de novo. *Atchison v Atchison*, 256 Mich App 531, 534; 664 NW2d 249 (2003). Issues of statutory construction are also questions of law that are reviewed de novo. *Id.* at 534-535. Whether the requirements of MCL 552.9(1) have been satisfied is a question of fact. *Berger v Berger*, 277 Mich App 700, 702; 747 NW2d 336 (2008). Questions of domicile and intent are also questions of fact. *Leader v Leader*, 73 Mich App 276, 283; 251 NW2d 288

(1977). We review factual findings for clear error. *Berger*, 277 Mich App at 702. "A finding is clearly erroneous if, on all the evidence, the Court is left with the definite and firm conviction that a mistake has been made." *Id*.

The relevant text of MCL 552.9(1) provides:

> A judgment of divorce shall not be granted by a court in this state in an action for divorce unless the complainant or defendant has resided in this state for 180 days immediately preceding the filing of the complaint and . . . the complainant or defendant has resided in the county in which the complaint is filed for 10 days immediately preceding the filing of the complaint.

The statutory residency requirements are jurisdictional, and a divorce is void if it does not comply with the residency requirements. *Stamadianos v Stamadianos*, 425 Mich 1, 3, 6; 385 NW2d 604 (1986).

Plaintiff argues the statute requires a complainant or defendant in a divorce action to simply facially comply with the statute, by being physically present in the state for 180 days before filing for divorce. Defendant maintains the statute requires a party not only to have been physically present in the state for 180 days but also to satisfy the legal definition of residence, which, by her interpretation, requires an intent to remain permanently or indefinitely in the state.

The meaning of "resided" as used in MCL 552.9(1) is an issue of statutory interpretation. This Court construes statutes in order to give effect to the Legislature's intent. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). This Court gives "the words of a statute their plain, ordinary meaning." *Bukowski v Detroit*, 478 Mich 268, 274; 732 NW2d 75 (2007). See also MCL 8.3a. However, "technical words and phrases, and such as may have acquired a peculiar

and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. When a term is undefined by a statute, this Court may look to dictionary definitions to aid its interpretation. *Oakland Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998).

MCL 552.9 does not define the word "resided." *Random House Webster's College Dictionary* (1997) contains the following definition of "reside": "[T]o dwell permanently or for some time; live." It defines "residence" as "the place . . . in which a person lives or resides; dwelling place; home." *Id*. Though the dictionary uses the word "permanently" in its definition of "reside," it qualifies it by also saying "or for some time." Further, the dictionary's definition of "residence" does not imply any requirement of intent to remain. Therefore, the ordinary, common meaning of the term "reside" does not require an intent to remain permanently or indefinitely. However, this Court ruled in *Leader* that "[d]omicile and residence in Michigan are synonymous terms" and that both require an intent to remain. *Leader*, 73 Mich App at 280; *Berger*, 277 Mich App at 703.

In *Wright v Genesee Circuit Judge*, 117 Mich 244; 75 NW 465 (1898), our Supreme Court interpreted an early version of MCL 552.9(1) that read: "a divorce from the bonds of matrimony may be decreed by the circuit court of the county where the parties, or one of them, reside." *Id*. at 245 (quotation marks and citation omitted). In interpreting the word "reside," the *Wright* Court defined the word "residence": "Residence means the place where one resides; an abode; a dwelling or habitation; especially, a settled or permanent home or domicile. Residence is made up of fact and intention.

There must be the fact of abode, and the intention of remaining." *Wright*, 117 Mich at 245. Thus, the Court in *Wright* held that "residence" requires both physical presence and an intention to remain, though the Court did not define how long a person must intend to remain to fulfill the residence requirement.

Importantly, the early statute as interpreted in *Wright* used the present tense "reside," while the current statute uses the present perfect tense, "has resided." *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) ("[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute."). Notwithstanding this change, since the *Wright* decision, our courts have regularly substituted the word "residence" for "resided." See, e.g., *Berger*, 277 Mich App at 702-704; *Smith v Smith*, 218 Mich App 727, 730; 555 NW2d 271 (1996). For example, in *Leader*, this Court quoted MCL 552.9(1) as providing a "judgment of divorce shall not be granted [. . .] unless the complainant or defendant has resided in this state for 180 days immediately preceding the filing of the complaint." *Leader*, 73 Mich App at 277. The Court then proceeded to interpret the meaning of the statute, stating: "Residence in Michigan is defined as a place of abode accompanied with the intention to remain." *Id.* at 280. See also *Berger*, 277 Mich App at 702-704 (explaining the jurisdictional requirement as "residence"); *Smith*, 218 Mich App at 730 (defining the word "residence" to explain the meaning of the term "resided" in the statute and stating "[w]hen used in statutes conferring jurisdiction, residence is interpreted to mean legal residence or domicile."). Therefore, while the word at

issue is "resided," this Court has used the term "residence" to discuss its meaning under MCL 552.9(1).

Because our Court has equated "resided" with residence and domicile, both of which require an intent to remain, we must consider the meaning of "intent to remain." *Leader*, 73 Mich App at 280. In *Smith*, 218 Mich App at 730, this Court stated, "The issue of legal residency is principally one of intent." In *Berger*, the defendant argued that the plaintiff did not meet the jurisdictional 10-day county residency requirement because she was not physically present in the county for all 10 days before filing for divorce. *Berger*, 277 Mich App at 702. This Court adopted the *Leader* analysis and held that the residency requirement was satisfied, stating, "We do not agree with defendant's argument that MCL 552.9(1) requires plaintiff's continuing physical presence in Jackson County for the 10 days immediately preceding filing for divorce." *Id.* at 703. The *Berger* Court cited *Leader*'s definition of "resided" and noted the case establishes "two important principles"—that intent is the preeminent factor for determining residence and also that an already established domicile is not destroyed by a temporary absence when there is no intention to change domicile. *Id.* at 703-704.

The Court in *Leader* did not define the word "intent" or explain the specific kind of intent that is required to meet the "resided" requirement of MCL 552.9(1). It merely stated there must be an "intention to remain." *Leader*, 73 Mich App at 280. The *Leader* Court ruled that, under its facts, jurisdiction in Michigan was proper despite the plaintiff's four-month absence from the state. The plaintiff in *Leader* traveled to Kentucky, where her husband was living, to attempt a reconciliation. *Id.* at 278. However, the plaintiff doubted a reconciliation would be possible, and after two weeks she

knew she wanted a divorce. *Id.* The plaintiff remained in Kentucky for four months only because she did not want to leave her children. *Id.* This Court ruled that the plaintiff never intended to make Kentucky her place of residence because, when she moved there, she expected to return to Michigan. *Id.* at 283. The *Leader* Court concluded that the intent required for jurisdiction under MCL 552.9(1) is an intent to make a place his or her residence, defined as "a place of abode accompanied with the intention to remain." *Id.* at 280.

Though our caselaw holds that intent is a key factor under MCL 552.9(1), we disagree with defendant's position that "intention to remain" requires that a party intend to remain "permanently or indefinitely," and our courts have never so held. To the contrary, for several reasons, we interpret "intention to remain" to mean something less than a commitment to stay permanently or indefinitely. Though, again, intent is a consideration for jurisdiction under MCL 552.9(1), the Legislature's use of the present perfect tense "has resided" cannot be ignored. The use of the term "resided" shows the Legislature did not intend to base a jurisdictional finding on conduct after the filing of the action for divorce. Indeed, the cases that define "resided" focus on the party's intent and conduct at and prior to the time of filing. See, e.g., *Leader*, 73 Mich App at 283; *Berger*, 277 Mich App at 702-704. Further, the Legislature's use of the term "resided" must be considered intentional and it is well-settled that the Legislature is presumed to mean what it says in a statute. *Detroit v Dep't of Social Servs*, 197 Mich App 146, 157; 494 NW2d 805 (1992). It is also axiomatic that courts " 'may not read into the statute what is not within the Legislature's intent as derived from the language of the statute.' " *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010),

quoting *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003). Thus, we decline to read language or requirements into the statute to require a continuing intention to remain permanently in the state when it is not manifest within the language used by the Legislature.

We further hold that policy considerations favor a reading of MCL 552.9(1) that confers jurisdiction in this case. If we adopted defendant's interpretation of "intent to remain," jurisdiction would be lacking when a person clearly lives in Michigan and has been physically present, as here, well beyond the statutory time period but some evidence suggests that he or she plans to move at some point in the future. And, if jurisdiction can be defeated on the basis of a mere intent to eventually leave, many people who currently live in Michigan will lack a forum to litigate disputes. This case is but one example: If the trial court here does not have jurisdiction over the parties' divorce, then there is no court anywhere in the United States that has jurisdiction. Thus, the parties will be unable to obtain a divorce in the United States despite the fact that both parties currently live in the United States, defendant intends to remain in the United States for at least another two years, and plaintiff plans to permanently reside here.

Moreover, because the Court in *Kubiak* interpreted "reside" in accordance with its popular meaning, which requires only physical presence, it would cause further jurisdictional complications to interpret *Leader* and its progeny to require a permanent or indefinite intent to remain. If *Leader* is interpreted as defendant advocates, a court could have jurisdiction over a child custody dispute under *Kubiak*, but the same court would not have jurisdiction to grant a divorce. It would be both nonsensical and a waste of judicial resources for the

same court to lack the ability to adjudicate all matters relating to the division of a family.

Defendant suggests that a divorce ruling in Washtenaw County could be collaterally attacked pursuant to *Williams v North Carolina*, 325 US 226, 236; 65 S Ct 1092; 89 L Ed 1577 (1945). In *Williams*, the United States Supreme Court ruled that "one State can grant a divorce of validity in other States only if the applicant has a *bona fide* domicil in the State of the court purporting to dissolve a prior legal marriage." *Id*. at 238. Our holding that the term "resided" in MCL 552.9(1) does not require an intent to remain permanently and indefinitely is compatible with *Williams*, which defines "domicile" as "a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." 325 US at 229. Even without a permanent or indefinite plan to stay in a particular state or county, a stay of some duration certainly meets the definition of "such permanence as to control the creation of legal relations and responsibilities of the utmost significance." As discussed, MCL 552.9(1) requires a person to have "resided," and "resided" requires physical presence plus an "intention to remain." *Leader*, 73 Mich App at 280-281. A person who is physically present and intending to remain in an area likely owns property or has a lease for housing, either of which undoubtedly creates "legal relations and responsibilities of the utmost significance." *Id*. at 281; *Williams*, 325 US at 229. The *Williams* definition suggests that if a person is in an area permanently enough to have legal relations and responsibilities, then the person is domiciled in that area. Here, defendant has consistently held long-term leases for housing and has arguably established other legal relations while living in this state for several years.

For the above reasons, though our courts have held that the "resided" requirement in MCL 552.9(1) constitutes "a place of abode accompanied with the intention to remain," *Leader*, 73 Mich App at 280, it does not require an intention to remain permanently and indefinitely. Accordingly, though defendant intends to leave the state once her studies are completed in 2012, there is no dispute that she lived in Michigan for years before the divorce complaint was filed, far longer than the 180-day statutory requirement, and, when the action was filed, she intended to remain in the state for several more years. Defendant clearly "resided" in this state for the requisite period under MCL 552.9(1), and the trial court correctly ruled that it has jurisdiction over the parties' divorce.

Affirmed.

GRIESBACH v ROSS (ON REMAND)

Docket No. 275826. Submitted July 6, 2010, at Lansing. Decided November 23, 2010. Approved for publication January 13, 2011, at 9:05 a.m.

Patrick Griesbach, a minor, by his next friend Sara Griesbach, and Timothy Griesbach brought a medical-malpractice action in the Oakland Circuit Court against Frank L. Fenton, D.O., and Walled Lake Medical Center, P.C. The alleged malpractice occurred in July 2002. Plaintiffs filed their notice of intent to file a claim on April 29, 2004, and filed their complaint on October 28, 2004. On January 26, 2005, defendants Fenton and Walled Lake Medical Center filed a notice of nonparty at fault, identifying Robert R. Ross, a certified physician assistant. On April 29, 2005, plaintiffs filed an amended complaint, adding Ross as a defendant. Plaintiffs stipulated to dismiss Fenton and Walled Lake Medical Center and proceeded against Ross. Following a jury verdict in favor of plaintiffs, the trial court, Denise Langford Morris, J., entered a judgment in favor of plaintiffs. Ross moved for judgment notwithstanding the verdict, arguing that the claims against him were barred by the statute of limitations, and the trial court denied that motion. Ross appealed. The Court of Appeals, K. F. KELLY, P.J., and OWENS and SCHUETTE, JJ., held in an unpublished opinion per curiam, issued May 22, 2008 (Docket No. 275826), that the amended complaint, by which Ross was added as a defendant, was not timely filed within the applicable two-year limitation period. On February 17, 2010, the Supreme Court, in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded the case to the circuit court for reconsideration in light of *Bush v Shabahang*, 484 Mich 156 (2009), and *Potter v McLeary*, 484 Mich 397 (2009). 485 Mich 1095 (2010). The Supreme Court then granted a motion for reconsideration, vacated its February 17, 2010, order, and, on reconsideration, in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded the matter to the Court of Appeals for reconsideration in light of *Bush* and *Potter*. 486 Mich 933 (2010).

On remand, the Court of Appeals *held*:

1. The *Bush* case is distinguishable from this case and its analysis is inapplicable to this case. Here, the notice of intent was defective, not because of an alleged omission of required allegations in the notice like in *Bush*, but because it did not name Ross as a party. The complete failure to serve Ross cannot be considered a mere defect that is subject to cure under MCL 600.2301. The *Bush* opinion affords no relief to plaintiffs.

2. The *Potter* decision is irrelevant to this case, which does not involve the questions presented in *Potter*. *Potter* does not compel a finding that the notice of intent sent to defendants Fenton and Walled Lake Medical Center tolled the statute of limitation with respect to defendant Ross, who was not named in that notice of intent. The trial court erred by denying the motion for judgment notwithstanding the verdict by defendant Ross.

Reversed.

Sommers Schwartz, P.C. (by *Danielle C. Schoeny*), and *Gasiorek Morgan & Greco, P.C.* (by *Paul W. Hines*), for Patrick and Timothy Griesbach.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank*), for Robert R. Ross, P.A.-C.

ON REMAND

Before: K. F. KELLY, P.J., and BANDSTRA and OWENS, JJ.

PER CURIAM. This medical-malpractice case returns to this Court on remand from the Michigan Supreme Court with directions that we reconsider the appeal of defendant Robert R. Ross, in light of *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), and *Potter v McLeary*, 484 Mich 397; 774 NW2d 1 (2009). See *Griesbach v Ross*, 486 Mich 933 (2010).[1] In the

[1] Our Supreme Court initially vacated our prior opinion and remanded to the circuit court for reconsideration in light of *Bush* and *Potter*. See *Griesbach v Ross*, 485 Mich 1095 (2010). However, it subsequently vacated that order and, after again vacating our prior opinion, remanded the case to this Court, directing this Court to reconsider the issue. *Griesbach*, 486 Mich 933.

original appeal, defendant Ross, a certified physician assistant, sought relief from an adverse jury verdict. We held that an amended complaint, by which Ross was added as a defendant, was not timely filed within the applicable period of limitations. *Griesbach v Ross*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2008 (Docket No. 275826) (hereinafter *Griesbach I*). For the reasons set forth in this opinion, we again reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts of this case were summarized in this Court's original opinion:

> On July 2, 2002, . . . Sara Griesbach took her 13-year-old son, [plaintiff] Patrick Griesbach, to see Ross at defendant Walled Lake Medical Center, P.C. ("Walled Lake"). Patrick complained of pain in his right leg. Ross ordered an x-ray, urinalysis, and blood tests, diagnosed a pulled muscle, and prescribed Tylenol® or ibuprofen. During the night, Patrick's pain increased, and Sara took Patrick to see Ross on July 3, 2002. Patrick again complained of leg pain. Ross did not know why Patrick was experiencing such pain, and he diagnosed a severely pulled muscle and prescribed Tylenol® with codeine. Ross also ordered a deep vein thrombosis test, the result of which was normal. Ross told Sara that the results of the blood tests were all normal, although Patrick's sedimentation rate was elevated, which is an indicator of inflammation. Defendant, Dr. Frank L. Fenton, D.O., a board-certified family practice physician, supervised Ross at Walled Lake. Fenton was not at Walled Lake during either of these visits, and although he was available by telephone or pager, Ross did not contact him. Ross did not suggest taking Patrick to the emergency room or consulting a specialist.
>
> After seeing Ross on July 3, 2002, the Griesbachs went on a previously scheduled trip, and the pain medication helped Patrick at first. However, on July 5, the pain increased and Patrick began vomiting. On July 6, Patrick was

> in "tremendous pain", and the Griesbachs returned to Michigan and took Patrick to the emergency room. Patrick was initially diagnosed with juvenile rheumatoid arthritis, but he was ultimately diagnosed with osteomyelitis, an infection in the bone. Patrick suffered from necrosis of the head of his femur and irreversible destruction of the cartilage in his hip, requiring surgery. [*Greisbach I*, unpub op at 1-2.]

There is no dispute that plaintiffs' complaint was timely filed with regard to defendants Fenton and Walled Lake. The alleged malpractice occurred on July 2 or 3 in 2002 and the limitations period would therefore expire on July 3, 2004. See MCL 600.5805(6) (setting a two-year limitations period for medical-malpractice claims). On April 29, 2004, plaintiffs filed their notice of intent (NOI) to file a claim, but only with regard to defendants Fenton and Walled Lake, and on October 28, 2004, 182 days later, they filed their complaint, again only with regard to defendants Fenton and Walled Lake. See MCL 600.2912b(1).[2] And, because plaintiffs filed an NOI within the limitations period, the statute of limitations was tolled, see MCL 600.5856(c), and their complaint was not barred by the July 2, 2004, limitations date.

Subsequently, on January 26, 2005, defendants Fenton and Walled Lake filed a notice of nonparty at fault pursuant to MCR 2.112(K), identifying Ross. On April 29, 2005, plaintiffs filed an amended complaint, adding Ross as a defendant. Given the two-year period of limitations, the complaint regarding defendant Ross

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[2] MCL 600.2912b(1), provides, in pertinent part:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

was filed outside that period. However, MCL 600.2957(2) provides that a cause of action filed after a nonparty at fault is identified will not be barred by the applicable limitations period unless it would have been barred at the time the initial complaint was filed.[3] Therefore, the issue presented in *Griesbach I* was whether plaintiffs' cause of action against defendant Ross would have been barred on October 28, 2004, when they filed their initial complaint against defendants Fenton and Walled Lake. This Court held that the claim against defendant Ross was barred when the October 28, 2004, complaint was filed because the NOI pertaining to defendants Fenton and Walled Lake did not toll the limitations period with respect to defendant Ross. We now consider the same question again, in light of *Bush* and *Potter* pursuant to our Supreme Court's remand order.

II. *BUSH v SHABAHANG*

In *Bush*, 484 Mich 156, the NOI did not meet the *content* requirements of MCL 600.2912b(4), i.e., the provision detailing what information an NOI must include. However, the *Bush* Court held that a timely filed NOI, even if defective under § 2912b, tolls the statute of limitations under § 5856(c), as amended by 2004 PA 87. *Bush*, 484 Mich at 170. The Court noted that § 2912b(1) focused on the timing of the notice, not on the absence of defects, and concluded that the Legislature never intended to bar an action on the basis of defects in the NOI. *Bush*, 484 Mich at 173. The Court held that defective NOIs could be cured pursuant to

[3] In *Driver v Naini*, 287 Mich App 339, 352; 788 NW2d 848 (2010), this Court concluded that the NOI statute, MCL 600.2912b, controlled over the nonparty-at-fault statute, MCL 600.2957(2), so that the time requirements for filing a complaint set forth in the NOI statute control.

MCL 600.2301, stating: "[T]he applicability of § 2301 rests on a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. If both of these prongs are satisfied, a cure will be allowed 'on such terms as are just.' " *Bush*, 484 Mich at 177-178, quoting MCL 600.2301. The Court reasoned that because a health-care professional would be able to evaluate a claim, despite defects in the NOI, his or her substantial rights would not be implicated. See *Bush*, 484 Mich at 178. Further, it found that a cure would be in the furtherance of justice because, under the factual circumstances, the plaintiff had made a good-faith attempt to comply with the content requirements of § 2912b(4). *Bush*, 484 Mich at 178. In other words, a trial court should only consider a dismissal based on a defective NOI if the defect affected a party's substantial rights and the plaintiff has not made a good-faith attempt to comply with the content requirements. *Id*.

In our view, *Bush* is distinguishable from the present case and, consequently, its analysis is simply inapplicable. Here, the NOI was not defective because of an omission of required allegations; rather, it was fatally deficient because it did not name a party. Unlike the defendants in *Bush*, the substantial rights of defendant Ross, a health-care professional, were implicated. Defendant Ross was never in a position to evaluate the claim against him, unlike the defendants in *Bush*, because he never received timely notice of a claim pending against him. Thus, the complete failure to serve defendant Ross with an NOI cannot be considered a mere defect, subject to cure. This Court articulated this same rationale when it recently held that *Bush* did not control where a complete failure to serve an NOI occurs:

> *Bush* dealt with a situation in which there were defects in a notice of intent, not a situation in which a party was completely left out of a notice of intent (received no notice whatsoever). *Bush*, 484 Mich at 160-161. Therefore, *Bush* is distinguishable. The first (and only relevant) issue in *Bush* was whether defects in a notice of intent would preclude tolling of the statute of limitations under MCL 600.5856. The Court held that defects in the notice of intent did not preclude notice tolling, because defects in the notice of intent can be addressed under MCL 600.2301, which allows for amendment and disregard of "any error or defect," where the substantial rights of the parties are not affected, and the cure is in furtherance of justice. *Bush*, 484 Mich at 161. We hold that plaintiffs' failure to give any notice whatsoever to CCA in the original notice of intent cannot be considered a mere defect in the notice, subject to cure, and also that the substantial rights of CCA would be affected (indeed, CCA, though a corporate person, has a due process right to notice). We also hold that such a drastic "cure" (adding a new party) would not be in the furtherance of justice (if plaintiffs could obtain tolling for a claim against CCA, though no notice whatsoever was provided to CCA in the original notice of intent). See *id*. Therefore, *Bush* and MCL 600.2301 do not allow plaintiffs to leave CCA out of the original notice of intent, toll the statute of limitations as against CCA, and then "cure" the "error or defect" by giving CCA an amended notice. [*Driver v Naini*, 287 Mich App 339, 354-355; 788 NW2d 848 (2010) (emphasis omitted).]

See also *Griesbach*, 485 Mich at 1095-1099 (YOUNG, J., dissenting).

Here, there was a complete failure to serve defendant Ross an NOI. Thus, *Bush* affords no relief to plaintiffs.

III. *POTTER v McLEARY*

In *Potter*, 484 Mich 397, the Michigan Supreme Court addressed whether a professional corporation is entitled to service of an NOI when the plaintiff alleges vicarious

liability for medical malpractice based on the conduct of one of its health professionals. *Id*. at 413-414. It concluded that such a professional corporation is entitled to service of an NOI, *id*. at 419, and held that the notice requirement of § 2912b does not require the plaintiff to explain the relationship between the professional corporation and its servants. *Potter*, 484 Mich at 420-421. Given the issues at play in *Potter*, it is plain to us that *Potter* is irrelevant to the present matter. This case involves questions pertaining to the applicable notice period under §§ 2912b and 2957(2); it does not involve the questions present in *Potter*. See also *Griesbach*, 485 Mich at 1095-1099 (YOUNG, J., dissenting). Accordingly, *Potter* does not compel a finding that the NOI sent to defendants Fenton and Walled Lake tolled the statute of limitations with respect to defendant Ross.[4] The trial court erred by denying the motion for judgment notwithstanding the verdict by defendant Ross.

Reversed.

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[4] In *Griesbach I*, this Court did not reach the other arguments of defendant Ross. Specifically, the Court did not address Ross's challenges to "the timeliness of plaintiffs' amended complaint, the admission of expert testimony, and the future damages award." *Griesbach I*, unpub op at 7. Given our resolution of this dispute on remand, we again find it unnecessary to consider these issues.

PECORARO v ROSTAGNO-WALLAT

Docket Nos. 293355 and 293445. Submitted August 6, 2010, at Detroit. Decided January 18, 2011, at 9:00 a.m.

Anthony S. Pecoraro filed a complaint for paternity in the Wayne Circuit Court against Gina Rostagno-Wallat, seeking to enforce an order of filiation he had obtained in the state of New York that named him as the biological father of a child born to Rostagno-Wallat in 2002. The New York proceedings had taken place despite the court's inability to exercise jurisdiction over Rostagno-Wallat's husband, Jeffrey C. Wallat. In response to Pecoraro's complaint, Wallat, who had been Rostagno-Wallat's husband since 1994, filed a declaratory action in the same court against Pecoraro and Rostagno-Wallat, seeking a determination that he was the legal father of the child. The suits were consolidated and the parties moved for summary disposition. The court, Richard B. Halloran, Jr., concluded that the New York decision gave Pecoraro standing to file a paternity suit and established his paternity of the child. Wallat and Rostagno-Wallat appealed, and the appeals were consolidated.

The Court of Appeals *held*:

1. Under the Paternity Act, MCL 722.11 *et seq*., when a child is born to a married woman, her husband is presumed to be the legal father. A putative father of that child has standing to bring suit only if the court has determined that the child is not the issue of that marriage. Such a determination must be an affirmative finding by the court regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father. The New York action was not a proceeding between Rostagno-Wallat, the mother, and Wallat, the legal father, and it did not satisfy the Paternity Act's requirements because it did not settle the controversy between the mother and the legal father. Therefore, the trial court erred in concluding that Pecoraro had standing to file the suit.

2. Whether a putative father would be considered a natural or biological parent under the Child Custody Act is irrelevant unless he can first establish paternity under Michigan's Paternity Act. Without standing under the Paternity Act, the putative father

must be considered a nonparent under the Child Custody Act and his child custody claim is barred.

3. Under the Full Faith and Credit Clause of the United States Constitution, a foreign judgment is conclusive and must be recognized if jurisdiction has been obtained over the parties and the subject matter. However, the courts of this state are not obliged under the federal Constitution to give a foreign judgment full faith and credit where the issuing court lacked jurisdiction over the subject matter or the parties, and a valid judgment affecting a nonresident's rights or interests may only be entered by a court having personal jurisdiction over that defendant. The New York court lacked personal jurisdiction over Wallat, a necessary party. Wallat was not required to choose between submitting to the jurisdiction of the New York court or placing his rights at risk, and Rostagno-Wallat's interest in the matter was not identical with his. The court was not obliged to give the New York order of filiation full faith and credit.

Reversed.

1. PARENT AND CHILD — LEGITIMACY PRESUMPTION — REBUTTAL.

Under the Paternity Act, when a child is born to a married woman, her husband is presumed to be the legal father; a putative father of that child has standing to bring suit only if the court has determined that the child is not the issue of that marriage; such a determination must be an affirmative finding by the court regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father (MCL 722.711[a], MCL 722.714).

2. PARENT AND CHILD — LEGITIMACY PRESUMPTION — REBUTTAL.

Whether a putative father would be considered a natural or biological parent under the Child Custody Act is irrelevant unless he can first establish paternity under Michigan's Paternity Act; without standing under the Paternity Act, the putative father must be considered a nonparent under the Child Custody Act, and his child custody claim is barred.

3. CONSTITUTIONAL LAW — FULL FAITH AND CREDIT CLAUSE — FOREIGN JUDGMENTS — PERSONAL JURISDICTION.

Under the Full Faith and Credit Clause of the United States Constitution, a foreign judgment is conclusive and must be recognized if jurisdiction has been obtained over the parties and the subject matter; however, the courts of this state are not obliged under the federal constitution to give a foreign judgment full faith

> and credit when the issuing court lacked jurisdiction over the subject matter or the parties, and a valid judgment affecting a nonresident's rights or interests may only be entered by a court having personal jurisdiction over that defendant (US Const, art IV, § 1).

Law Offices of Jeffery A. Cojocar, P.C. (by *Jeffery A. Cojocar*), for Anthony S. Pecoraro.

Anne Argiroff and *Mekel Miller* for Gina Rostagno-Wallat.

Judith A. Curtis and *Kenneth E. Prather* for Jeffrey C. Wallat.

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

ZAHRA, J. In these consolidated appeals by leave granted,[1] Jeffrey C. Wallat and his spouse, Gina Rostagno-Wallat, (collectively referred to as "the Wallats") appeal an order issued by the Wayne Circuit Court which, among other things, enforces an order of filiation issued by a New York court. The order of filiation declared Anthony Pecoraro to be the father of a child conceived and born to Rostagno-Wallat during her marriage to Wallat. On appeal, we must decide whether Pecoraro has standing to bring suit to establish paternity in Michigan. We must also consider whether the Full Faith and Credit Clause of article IV, § 1 of the United States Constitution requires us to give full force and effect to the order of filiation entered by the New York court.

In Michigan, a child conceived and born during a marriage is legally presumed the legitimate child of that marriage, and the mother's husband is the child's

[1] *Pecoraro v Rostagno-Wallat*, unpublished order of the Court of Appeals, entered January 11, 2010 (Docket Nos. 293355 and 293445).

father as a matter of law. A third party may not rebut this legal presumption unless there first exists a judicial determination arising from a proceeding between the husband and the wife that declares the child is not the product of the marriage. Because there was no paternity determination made in legal proceedings involving Wallat and Rostagno-Wallat that established Wallat was not the father of the child, we hold that Pecoraro lacks standing to seek paternity under Michigan's Paternity Act. Further, because the New York court concluded that it lacked personal jurisdiction over Wallat, a necessary party to the paternity proceedings, we hold that the Full Faith and Credit Clause of the United States Constitution does not require us to give effect to the New York order of filiation. We reverse the judgment of the lower court and remand for entry of judgment consistent with this opinion.

I. BASIC FACTS AND PROCEDURE

The Wallats have been married to each other since June 4, 1994. At all times pertinent to this action, they have resided in Michigan. Two children were conceived and born during their marriage, one was born in 1999 and the other in 2002. The birth certificates of both children identify Jeffrey Wallat as the father.

Rostagno-Wallat and Pecoraro attended law school together in Lansing, Michigan. In June of 1997, their relationship expanded beyond the study of law. An intimate relationship between them continued on an "on-and-off" basis after Pecoraro graduated from law school in 1998 and returned to his home in Buffalo, New York. Rostagno-Wallat informed Pecoraro that he was the biological father of the child born in 2002 (throughout the remainder of this opinion, the child born in 2002 is referred to as "the child"). Deoxyribonucleic acid

(DNA) testing performed in 2002 confirmed that Pecoraro was the biological father of the child. In April 2005, Rostagno-Wallat and Pecoraro permanently ceased their relationship and litigation commenced shortly thereafter.

A. PECORARO'S PATERNITY ACTION IN NEW YORK

In June 2005, Pecoraro filed a paternity petition against Rostagno-Wallat in New York, seeking an order of filiation establishing himself as the father of the child. Rostagno-Wallat moved to dismiss the paternity action for lack of personal jurisdiction, as neither she nor the child ever had resided in New York. Rostagno-Wallat also argued that dismissal was required because Pecoraro failed to name a necessary party—her husband, Jeffrey Wallat, who also was not subject to the jurisdiction of New York.[2] Finally, Rostagno-Wallat argued that paternity was already established by operation of Michigan law, which presumes that, absent a prior judicial determination to the contrary, all children born of a marriage are the product of the marriage. *Girard v Wagenmaker*, 437 Mich 231, 242-244; 470 NW2d 372 (1991); MCL 722.711(a); MCR 3.903(7).

The New York court denied Rostagno-Wallat's motion to dismiss the paternity petition. The New York court found that it had jurisdiction over Rostagno-Wallat under NY Fam Ct Act § 580-201(6), because she engaged in sexual intercourse in New York and the child may have been conceived by that act. Thereafter, Pecoraro apparently amended his petition to name Wallat as a defendant.

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[2] New York's Civil Practice Law and Rules, CPLR 1001(a), defines necessary parties as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

Wallat made a special appearance in the New York court to contest the court's jurisdiction over him. Wallat argued the paternity action had to be dismissed because he was a necessary party to the establishment of paternity and he could not be compelled to litigate in New York because New York did not have personal jurisdiction over him. Wallat, like Rostagno-Wallat, argued that the paternity of the child was established pursuant to Michigan law.

The New York court conceded that Wallat was a necessary party to the paternity action and that it did not have any basis to exercise personal jurisdiction over Wallat. The New York court also acknowledged that under Michigan law, paternity was established in Wallat, since he was the spouse of Rostagno-Wallat at the time of conception. Nonetheless, the New York court found that under New York's Civil Practice Law and Rules, CPLR 1001(b), dismissal of the paternity action was not required. This rule provides, in pertinent part, that "[i]f jurisdiction over [a necessary party] can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party."[3] The New York court held that justice required that Pecoraro be permitted to

[3] CPLR 1001(b) provides in full:

> When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:
>
> 1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
>
> 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

proceed with the matter even though the court could not obtain jurisdiction over Wallat. Wallat's motion to dismiss for lack of personal jurisdiction was denied.[4]

A trial was held on the issue of paternity. Rostagno-Wallat did not attend the trial and presented no proofs. In April 2007, the New York court issued a decision and order that held Rostagno-Wallat was estopped from denying that Pecoraro was the father of the child. The New York court granted Pecoraro's petition to establish paternity and issued an order of filiation declaring him the father of the child. Thereafter, the New York court dismissed Pecoraro's claim against Wallat for lack of personal jurisdiction. The Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, subsequently affirmed this order on June 6, 2008, Docket No. CAF 08-00128.

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3. whether and by whom prejudice might have been avoided or may in the future be avoided;

4. the feasibility of a protective provision by order of the court or in the judgment; and

5. whether an effective judgment may be rendered in the absence of the person who is not joined.

[4] New York's CPLR 1001(b) provides that, under limited circumstances, litigation may proceed without a necessary party over whom the court lacks jurisdiction. We question whether this court rule comports with the minimum requirements of due process. This aside, the rule does not in any way purport to establish a basis for personal jurisdiction over the necessary party where none exists. Thus, it is puzzling that the New York court did grant in part Wallat's motion and dismiss him from the litigation, while continuing litigation between Pecoraro and Rostagno-Wallat. In any event, Wallat was not an active participant to the paternity proceedings and never submitted himself to the jurisdiction of the New York court. After the New York court entered its order of filiation establishing paternity in Pecoraro, it dismissed Pecoraro's claims against Wallat for lack of personal jurisdiction.

B. LEGAL PROCEEDINGS IN MICHIGAN

In January 2006, before the resolution of the paternity action in New York, Wallat filed a paternity action against Rostagno-Wallat in the Wayne Circuit Court. After conducting a hearing with testimony from Wallat and Rostagno-Wallat, the court entered an order dismissing the case because the child was conceived and born during the parties' marriage and thus was not born out of wedlock. The court concluded it lacked jurisdiction to enter an order of filiation "due to paternity already being established."

In February 2008, while the New York proceedings were on appeal, Pecoraro filed in the Wayne Circuit Court a "Complaint for Paternity" against Rostagno-Wallat in which he, among other things, sought enforcement of the New York order of filiation. This complaint alleged that the parties were never married and had one minor child born out of wedlock. In July 2008, Wallat filed a complaint for declaratory judgment against Rostagno-Wallat and Pecoraro. In this action, Wallat sought a determination that he is the legal father of the child. After additional procedural maneuvering by and between the litigants, all parties eventually filed motions for summary disposition. On July 16, 2009, the trial court issued an opinion and order finding in favor of Pecoraro. This appeal followed.

II. ANALYSIS

On appeal, the Wallats argue that the trial court erred by finding that Pecoraro had standing under Michigan's Paternity Act, MCL 722.711 *et seq*. They also argue the trial court erred in concluding that it was constitutionally required to give full faith and credit to the New York order of filiation issued by the New York court. We agree.

A. STANDARD OF REVIEW

Whether a party has standing to commence an action to establish paternity under the Paternity Act involves a question of law that this Court reviews de novo. *Barnes v Jeudevine*, 475 Mich 696, 702; 718 NW2d 311 (2006). We also review de novo the interpretation of statutes, jurisdictional issues, and constitutional questions. *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006); *Pontiac Food Ctr v Dep't of Community Health*, 282 Mich App 331, 335; 766 NW2d 42 (2009); *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 620; 692 NW2d 388 (2004).

B. PECORARO LACKS STANDING TO ESTABLISH PATERNITY IN MICHIGAN

Pecoraro argues that he can enforce the New York order of filiation under § 4b of the Paternity Act, which provides that "[t]he establishment of paternity under the law of another state has the same effect and may be used for the same purposes as an acknowledgment of paternity or order of filiation under this act." MCL 722.714b. We find no merit in this argument. Before Pecoraro may assert the provisions of the Paternity Act, he must establish that he has standing under that act.

Standing to pursue relief under the Paternity Act is conferred on "(1) the mother of a child born out of wedlock, (2) the father of a child born out of wedlock, or (3) the Family Independence Agency[5] on behalf of a child born out of wedlock who is being supported in whole or in part by public assistance." *McHone v Sosnowski*, 239 Mich App 674, 677; 609 NW2d 844

[5] The Family Independence Agency is now the Department of Human Services.

(2000), citing MCL 722.714(1) and (8). Under the statute, a "child born out of wedlock" is defined as "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a); *In re KH*, 469 Mich 621, 631-632; 677 NW2d 800 (2004).

It is undisputed that on the date of conception and at all times pertinent to these proceedings, Rostagno-Wallat has been married to Wallat. Thus, the first method for establishing that the child was born "out of wedlock" cannot be satisfied. The only remaining method of establishing that a child was born "out of wedlock" requires a court's determination that the child is not the issue of the marriage. *Barnes*, 475 Mich at 703-704, citing *Girard*, 437 Mich at 243. In *Barnes*, the Michigan Supreme Court held "that a court determination under MCL 722.711(a) that a child is not 'the issue of the marriage' requires that there be an affirmative finding regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father." *Id*. at 705.

Pecoraro maintains that the New York order of filiation constituted a prior court determination that the child was not the issue of defendants' marriage. Although the New York court made this finding, the New York action was not a proceeding between Rostagno-Wallat, the mother, and Wallat, the legal father. Rather, the New York court expressly allowed the action to proceed without having personal jurisdiction over Wallat. Further, because Wallat could not be forced to participate in the proceedings, the New York proceedings clearly did not "settle[] the controversy between the mother and the legal father," satisfying the

Paternity Act. *Barnes*, 475 Mich at 705. Simply put, because Rostagno-Wallat and Wallat have not asked a court to declare that the child was born out of wedlock, Pecoraro lacks standing to claim paternity under Michigan's Paternity Act.

Pecoraro also argues he has standing to assert his claim under the Child Custody Act, MCL 722.21 *et seq*., which defines "parent" as "the natural or adoptive parent of a child." MCL 722.22(h). This definition was added to the Child Custody Act, which did not previously define the term "parent," by 2004 PA 542. Pecoraro maintains that because he is the child's biological father, he is the natural father, as that term is used the Child Custody Act. Thus, he concludes, he may pursue his claim under the Child Custody Act, which confers on parents standing to seek custody of their children. *Aichele v Hodge*, 259 Mich App 146, 165; 673 NW2d 452 (2003).

Our Supreme Court in *Girard* addressed the interaction between the Paternity Act and the Child Custody Act. *Gerard*, 437 Mich at 251. As in the instant case, the Court in *Girard* held that "a putative father of a child born to a woman married to another man[] did not have standing to contest paternity under the Paternity Act." *Id*. *Girard* further posited that, given this conclusion, the putative father "clearly could not obtain a determination that he was the natural or biological father of the child under the Child Custody Act." *Id*. The *Girard* Court then concluded that, because the putative father "could not obtain a determination that he was a parent of [the] child, [the putative father] must be considered a nonparent under the Child Custody Act and his child custody claim is barred." *Id*., citing *Ruppel v Lesner*, 421 Mich 559, 565; 364 NW2d 665 (1984).

The central premise in *Girard* was that, given the court's conclusion that the putative father did not have

standing to contest paternity, the putative father "clearly could not obtain a determination that he was the natural or biological father of the child." *Id*. at 251. The Legislature's amendment to the Child Custody Act does not alter this central premise. The purpose of the 2004 amendment was to provide statutory rights to adoptive parents. The phrase "natural parent" was used by the Legislature to distinguish between adoptive parents and non-adoptive parents. Nothing in the amendment supports the conclusion that it was intended to circumvent the Paternity Act. Pecoraro simply cannot use the Child Custody Act to obtain a determination that he is the father under the Paternity Act. Whether the putative father would be considered a natural or biological parent under the Child Custody Act is irrelevant unless he can first establish paternity under Michigan's Paternity Act. Accordingly, we reject Pecoraro's claim under the Child Custody Act.

C. THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION

Pecoraro also argues that Michigan is required to give effect and full force to the New York order of filiation. Specifically, Pecoraro argues that the New York judgment must be honored under the Full Faith and Credit Clause of the United States Constitution, art IV, § 1, and the Uniform Enforcement of Foreign Judgments Act, (UEFJA), MCL 691.1171 *et seq*. Because the UEFJA specifically references a "judgment, . . . that is entitled to full faith and credit," MCL 691.1172, Pecoraro's argument under the UEFJA rises or falls on his constitutional claim under the Full Faith and Credit Clause.

The Full Faith and Credit Clause provides, in relevant part, that "Full Faith and Credit shall be given in

each State to the Public Acts, Records, and judicial Proceedings of every other State." US Const, art IV, § 1. The purpose of the Full Faith and Credit Clause "is to prevent the litigation of issues in one state that have already been decided in another." *Martino v Cottman Transmission Sys, Inc*, 218 Mich App 54, 58; 554 NW2d 17 (1996). A foreign judgment is conclusive and must be recognized if jurisdiction has been obtained over the parties and the subject matter. *Baker v Gen Motors Corp*, 522 US 222, 233; 118 S Ct 657; 139 L Ed 2d 580 (1998); see *Nat'l Equip Rental, Ltd v Miller*, 73 Mich App 421, 424; 251 NW2d 611 (1977).

Before a court is bound by a judgment rendered in another state, however, it may inquire into its jurisdictional basis, and if either personal or subject-matter jurisdiction is lacking, full faith and credit is not due. *Underwriters Nat'l Assurance Co v North Carolina Life & Accident & Health Ins Guaranty Ass'n*, 455 US 691, 705; 102 S Ct 1357; 71 L Ed 2d 558 (1982). Thus, collateral attack of a foreign judgment is permitted in Michigan by showing that the judgment a party is seeking to enforce was void for want of jurisdiction in the court that issued it. *Nash v Salter*, 280 Mich App 104, 119-120; 760 NW2d 612 (2008). Accordingly, the courts of this state are not obliged under the federal Constitution to give a foreign judgment full faith and credit where the issuing court lacked jurisdiction over the subject matter or the parties. *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 217; ___ NW2d ___; *California v Max Larsen, Inc*, 31 Mich App 594; 597-598, 187 NW2d 911 (1971). Further,

> [t]he Due Process Clause of the Fourteenth Amendment limits the jurisdiction of state courts to enter judgments affecting the rights or interests of nonresident defendants. As a result, a valid judgment affecting a nonresident's rights or interests may only be entered by a court having

> personal jurisdiction over that defendant. [*Jeffrey v Rapid American Corp*, 448 Mich 178, 185; 529 NW2d 644 (1995) (citations omitted).]

We hold that the New York order of filiation was not a valid and binding judgment as to Wallat. We base this holding on three distinct but related findings. First, the New York court lacked personal jurisdiction over Wallat. This point is not in contention. The New York court expressly found that it lacked personal jurisdiction over Wallat. Upon finding that the New York court lacked jurisdiction over him, Wallat was not required to submit to the jurisdiction of New York or put his parental rights in peril.

Second, the New York court also found that Wallat was a necessary party to the paternity proceedings in New York. The court recognized that, as Rostigno-Wallat's spouse and the legal father under Michigan law, Wallat had exercised parental rights over the child and had established himself as a stable and substantial presence in the life of the child. The New York court observed that it could not issue an order of filiation to Pecoraro without substantially impacting Wallat's parental rights under Michigan law.

Third, the New York court expressly recognized that the effect of its action would ultimately have to be determined by a Michigan court. We presume the New York court recognized this point because it lacked jurisdiction over a necessary party.

We are unpersuaded by Pecoraro's claim that Wallat's remedy, if any, was through the New York appellate court, which affirmed the order of filiation. Again, the New York court found it lacked personal jurisdiction over Wallat and it found that Wallat was a necessary party to the proceedings. Upon entering the judgment, the court dismissed the claims asserted against Wallat

by Pecoraro for lack of personal jurisdiction. In essence, Pecoraro is claiming that Wallat should have pursued appellate rights when Wallat had no adverse ruling or judgment imposed against him. Simply put, Pecoraro is asserting that Wallat was obligated to submit to the jurisdiction of New York or forfeit his parental rights. Pecoraro offers no legal authority for his position. Moreover, we are aware of no case that requires a party to submit to the jurisdiction of a court or place his rights at risk.

Similarly, we are not persuaded by the argument that the New York court order should be honored because, in arguing the merits of the underlying claim, Rostagno-Wallat protected the interests of Wallat. We conclude that the interests of Rostagno-Wallat, the mother, were not consistent with the interests and rights of Wallat, the legal father. Rostagno-Wallat's parental rights as mother were never at risk in this litigation. More significant, however, is the notion that a judgment issued in a matter that does not include a necessary party has no effect. As a result, the courts of the state of Michigan are not obliged to give the New York order of filiation full faith and credit.

III. CONCLUSION

Pecoraro lacks standing to assert his claim of paternity under Michigan's Paternity Act. Because New York admittedly lacked personal jurisdiction over Wallat, a necessary party to the proceedings in New York, the order of filiation issued by the New York court is not entitled to full faith and credit under article IV, § 1 of the United States Constitution.

We reverse the judgment of the trial court and remand for entry of judgment consistent with this opinion. We do not retain jurisdiction.

SHOUNEYIA v SHOUNEYIA

Docket No. 297007. Submitted December 9, 2010, at Lansing. Decided January 18, 2011, at 9:05 a.m.

Patricia A. Shouneyia obtained a divorce from Alec E. Shouneyia in the Oakland Circuit Court in October 2008. As part of the divorce judgment, Alec was ordered to pay Patricia a property settlement of $50,000 and attorney fees of $40,000. In June 2009, Patricia moved for the appointment of a receiver, asserting that Alec had failed to make any payments toward the debt. The court, Linda S. Hallmark, J., ordered a creditor's examination. Patricia filed a renewed motion for the appointment of a receiver following the examination. The court granted the motion. A short time later, Patricia filed another motion for a receiver, requesting that the receiver have powers over Shouneyia Bros. Corp. (Shouneyia Brothers), which was coowned by Alec and his brother Frank Shouneyia and operated a market. The court granted the motion. Alec and Shouneyia Brothers filed an application for leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

1. A court may not make an adjudication affecting the rights of a person or entity that is not a party to the case. Accordingly, the circuit court did not have the authority to adjudicate the rights of Shouneyia Brothers without first making it a party to the case.

2. A third party may be made a defendant in a divorce action when it is alleged that the third party conspired with one of the marital parties with the intent to defraud the other marital party out of an interest in property. Because Patricia alleged that Alec sought to conceal in the market operated by Shouneyia Brothers income and assets to which she had a claim as a judgment creditor, Shouneyia Brothers should have been added as a necessary party to this action. The circuit court was directed to add Shouneyia Brothers as a party on remand.

3. MCL 600.2926 invested the circuit court with the authority to appoint a receiver. In light of the facts of this case, including the circuit court's finding that Alec had given evasive and false answers at the creditor's examination, suspicious deposits shown in the market's bank records, and suspicious business practices at

the market, the circuit court did not abuse its discretion by appointing a receiver to investigate Alec's business income and hold assets to satisfy the divorce judgment debt. As long as the circuit court joined Shouneyia Brothers as a party to the case on remand, the circuit court's decision to appoint a receiver to investigate the financial condition of the corporation was within the range of principled outcomes.

Affirmed in part and remanded.

DIVORCE — CONCEALMENT OF ASSETS — APPOINTMENT OF A RECEIVER — JOINDER OF A THIRD-PARTY CORPORATION.

In a divorce case, a circuit court may appoint a receiver over a third-party corporation in the face of allegations that one of the divorcing spouses used the corporate form to conceal assets or funds that could be used to satisfy a judgment debt to the other spouse.

Hauer & Snover, P.C. (by *Mark A. Snover* and *James D. Moriarty*), for Patricia A. Shouneyia.

Paul C. Smith PLLC (by *Paul C. Smith*) for Alec E. Shouneyia and Shouneyia Bros. Corp.

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

GLEICHER, J. Defendant Alec E. Shouneyia owes money to plaintiff Patricia A. Shouneyia, his former spouse, for a property settlement and attorney fees contained in a divorce judgment. Plaintiff moved for the appointment of a receiver over assets or income possessed by defendant in Shouneyia Bros. Corp. (Shouneyia Brothers), an entity coowned by defendant and his brother, Frank Shouneyia. The circuit court appointed a receiver over Shouneyia Brothers without joining the company as a party to the proceeding, prompting defendant and Shouneyia Brothers (collectively referred to as "appellants") to seek leave to appeal, which this Court granted. We affirm the order appointing a receiver, but remand for the addition of the corporation as a party defendant.

In October 2008, the circuit court entered a divorce judgment, which in pertinent part awarded plaintiff a $50,000 property settlement and ordered defendant to pay plaintiff $40,000 in attorney fees. In June 2009, plaintiff urged the court to appoint a receiver "to collect the money Defendant owes Plaintiff" pursuant to the judgment of divorce, because defendant had paid nothing toward this debt. Plaintiff added that although defendant represented in January 2009 that he "was attempting to get a loan," that the loan apparently "has never come to fruition." Defendant responded that he had a long list of properties in foreclosure and other debts that left him insolvent. At a July 2009 hearing, plaintiff accused defendant of having lied under oath at the divorce trial about his lack of income from several real property rentals, his purchase of a winning lottery ticket ($15,000), and his receipt of checks (including one in the amount of $50,000) from his mother. The court ruled, "I understand there's quite a bit of distrust; however, before we go to a receiver I think it's not unreasonable to hold a creditor's exam."

At a December 2009 examination, defendant appeared without counsel or supporting documentation, and in response to inquiries by plaintiff's counsel he repeatedly expressed an inability to recall or answered in a nonspecific fashion. Defendant did testify that he received a salary of about $300 a week from the Vineyard Market, operated by Shouneyia Brothers. Defendant averred that he and his brother, Frank Shouneyia, jointly ran Shouneyia Brothers and Vineyard Market, but that his brother was "out of the business right now," in part because of a pending lawsuit that defendant had filed against Frank. With respect to the only other income source defendant could recall, a shopping center coowned by eight siblings, defendant could not remember how much income he received. Defendant

denied having any other personal income or assets, apart from occasional monetary assistance from his mother and siblings. When plaintiff's attorney presented defendant with a statement reflecting a $20,000 wire transfer from defendant's girlfriend to defendant's business account, defendant responded that the money was to "[h]elp me out, get the business going, maybe I was short, maybe at the time; though, I don't remember." Regarding monthly business-related bank deposits between December 2008 and July 2009 in amounts of more than $400,000 to in excess of $600,000, defendant explained that he provided check cashing services for his customers, resulting in large deposits. Defendant proclaimed that he charged little to no money for this service, which thus generated no appreciable income. Defendant refused to answer any questions relating to whether he ever won the lottery and induced an employee to claim the winnings for him.

In January 2010, plaintiff filed a renewed motion for the appointment of a receiver to collect the divorce judgment awards defendant owed her. Plaintiff characterized defendant's December 2009 testimony "as either a total fabrication and/or misrepresentation, perjury and at best evasive." The circuit court found as follows at a hearing on plaintiff's motion:

> Well, I have read the transcript of the creditor's exam, and to say that Mr. Shouneyia was evasive would be an understatement. Thousands of dollars coming in and out of these accounts and he never has any funds. It may well be that he has no funds. I don't know. But I tried this case and he was ordered to make a property settlement to this lady and a year has gone by; she has not received a nickel. And she is spending attorney fees and there are children. It's unconscionable. Unconscionable.
>
> If he is receiving money from the [family] trust, where has that been? Now at the eleventh hour, a year later, he's

> going to offer her some money from the trust? Too little, too late. She should not have to chase him around to get these funds. And I don't believe there was an honest answer through this entire creditor's exam.
>
> It's unfortunate, however, a receiver is more than justified. I will appoint Henry Nirenberg as receiver. And if indeed Mr. Shouneyia has no assets, Mr. Nirenberg will report that back to us, but I think he needs to have a look.
>
> . . . Somebody needs to step forward, be honest, and let's get off the mark. But I don't think, a year from now, this lady should still be chasing around to get $50,000. That's ridicules [sic].

On January 20, 2010, the circuit court entered an order granting plaintiff's motion to appoint a receiver.

In February 2010, plaintiff filed another motion to appoint a receiver. Plaintiff premised the motion on the same facts set forth in the January 2010 motion to appoint a receiver, but requested "that the Receiver have powers over Shouneyia Brothers Corporation, . . . D/B/A Vineyard Market," among other business entities. Receiver Nirenberg advised the court at a March 2010 hearing that defendant had thwarted his initial efforts to review the Vineyard Market's inventory and records. However, Nirenberg did notice that

> the cash registers are zeroed out each day on a Z key three times a day, and that was indicated clearly to my accountant; therefore, there is no trail of what comes in and out of that business. The check cashing that goes on, there is no trail of that, as well.

Defendant expressed a desire to discuss a settlement, prompting the hearing to adjourn. A week later, defendant had not engaged in any settlement discussions with the receiver. The circuit court reasoned as follows that it would appoint a receiver over the corporate entity operating the market:

> Well, frankly, having read all of the briefs I'm not really convinced that Estes versus Titus [481 Mich 573; 751 NW2d 493 (2008)] is applicable in this situation, I think that was a little bit of a different scenario where assets were transferred to avoid payment, it really wasn't a receivership type of a case, and I'm not positive the Court has jurisdiction to grant the relief that's been requested.
>
> However, I am going to . . . grant your motion, . . . because we don't have objections from either of the third parties. I think the bank is satisfied that they're protected, the other partner . . . or the other member of the corporation is not objecting, so there's really no one else to protect at this point.

On March 17, 2010, the court entered an order appointing Nirenberg "as Receiver of the assets of Defendant, . . . and Receiver of SHOUNEYIA BROS. CORP ('Entity') including all businesses operated through said Entity, including Vineyard III Market . . . as well as all of the following-described property . . . ." The court added that it was grounding the receiver's appointment on MCL 600.2926.

Appellants first aver on appeal that the circuit court's failure to join Shouneyia Brothers as a party defendant in the underlying divorce action precluded the court from exercising authority over the corporation. Michigan courts have consistently recognized that court may not make "[a]n adjudication affecting" the rights of a person or entity not a party to the case. *Capitol S&L Co v Standard S&L Ass'n*, 264 Mich 550, 553; 250 NW 309 (1933); see also *Spurling v Battista*, 76 Mich App 350, 353; 256 NW2d 788 (1977) (concluding that "the trial court did not have the power to compel [a law firm] to pay witness fees" when the law firm "was not a party to this action"). Plaintiff theorizes that the appointment of a receiver does not adversely affect any interested nonparty's rights, given that Frank

Shouneyia, defendant's coowner in Shouneyia Brothers, consented to the receivership. But plaintiff's argument ignores that the corporation itself amounts to an interested party.[1] The circuit court thus did not have authority to adjudicate the rights of Shouneyia Brothers without first making it a party to the case.

But, as recognized in MCR 2.207, "Misjoinder of parties is not a ground for dismissal of an action. Parties may be added or dropped by order of the court on motion of a party or on the court's own initiative at any stage of the action and on terms that are just." See also *Henkel v Henkel*, 282 Mich 473, 488; 276 NW 522 (1937) (explaining that ordinarily "if the proper parties plaintiff are not joined, this court will direct the joinder of the proper parties plaintiff on appeal"). Except in circumscribed circumstances, "the jurisdiction of a divorce court is strictly statutory and limited to determining the rights and obligations between the husband and wife, to the exclusion of third parties." *Estes*, 481 Mich at 582-583 (quotation marks and citation omitted). "Third persons may be made defendants in an action for divorce where it is charged that such persons have conspired with the husband with intent to defraud the wife out of her interest in property." *Berg v Berg*, 336 Mich 284, 288; 57 NW2d 889 (1953). Because plaintiff here has alleged in multiple receivership motions that defendant sought to conceal income and assets in the market operated by Shouneyia Brothers, which plaintiff has a claim to as a judgment creditor, this divorce matter presents an appropriate case for joinder of the

[1] "A corporation is a person in the eyes of the law . . . ." *Jones v Martz & Meek Constr Co, Inc*, 362 Mich 451, 455; 107 NW2d 802 (1961); see also *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996) ("As a general proposition, the law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all the corporation's stock.").

third party purportedly engaged in fraud. Consequently, we direct the circuit court on remand to add Shouneyia Brothers as a necessary party to this action. MCR 2.205(A) ("[P]ersons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties . . . ."); MCR 2.207.[2]

In light of the fact that Shouneyia Brothers may properly be joined in the case, we must next address the propriety of the circuit court's order imposing a receivership over the corporation. "We review for an abuse of discretion the circuit court's decision to appoint a receiver." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 273; 761 NW2d 761 (2008).

The circuit court correctly cited MCL 600.2926 as investing it with authority to appoint receivers. Specifically, MCL 600.2926 authorizes, in pertinent part:

> Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is *allowed by law*. . . . In all cases in which a receiver is appointed the court shall . . . define the receiver's power and duties where they are not otherwise spelled out by law. Subject to limitations in the law or imposed by

[2] Under the unusual circumstances of this case, we find it appropriate to substantively review the propriety of the circuit court's order imposing a receivership over the Shouneyia Brothers corporation, instead of simply vacating the order and remanding the case to allow the corporation to formally file a pleading as a party and then litigate anew the receivership issue. The corporation is a party to this appeal and has already set forth its position against the imposition of a receivership, which mirrors defendant's challenge to the receivership. It would be a waste of judicial time and resources for the circuit court to relitigate the receivership issue given that (1) the corporation's sole shareholders are defendant and his brother, (2) defendant's brother apparently consented to the receivership, and (3) on remand the corporation would either not file any pleadings or make filings consistent with those already presented by defendant in the circuit court.

> the court, the receiver shall be charged with all of the estate, real and personal debts of the debtor as trustee for the benefit of the debtor, creditors and others interested. [Emphasis added.]

Furthermore, "[a]fter judgment for money has been rendered in an action in any court of this state, the judge may, on motion in that action or in a subsequent proceeding . . . [a]ppoint a receiver of any property that the judgment debtor has or may thereafter acquire . . . ." MCL 600.6104(4).

> [MCL 600.2926] has been interpreted as authorizing a circuit court to appoint a receiver when specifically allowed by statute and also when no specific statute applies but the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction. The purpose of appointing a receiver is to preserve property and to dispose of it under the order of the court. In general, a receiver should only be appointed in extreme cases. But a party's past unimpressive performance may justify the trial court in appointing a receiver. [*Reed v Reed*, 265 Mich App 131, 161-162; 693 NW2d 825 (2005) (quotation marks and citations omitted).]

See also *Cohen v Cohen*, 125 Mich App 206, 214; 335 NW2d 661 (1983) (noting that "[t]he appointment of a receiver may be appropriate when other approaches have failed to bring about compliance with the court's orders").

The pertinent facts appear undisputed. Pursuant to the parties' agreement, the circuit court incorporated into the October 2008 judgment of divorce the property settlement of $50,000. Defendant made no payments toward either this amount or the circuit court's award of attorney fees to plaintiff over the course of the 1½ years between entry of the judgment of divorce and the March 2010 order appointing the receiver, from which defendant now appeals. In this 1½ year period, plaintiff

made unsuccessful efforts to collect the judgment owed by defendant: (1) plaintiff's counsel questioned defendant under oath at a creditor's examination and the court expressly found that defendant had given evasive and false answers at the examination, and (2) the court nonetheless subsequently afforded defendant the opportunity to negotiate a settlement with plaintiff, but defendant thereafter declined to enter a settlement. At the creditor's examination, defendant acknowledged when shown the market's bank records that the business had consistently deposited between $440,000 and $669,000 over the course of several months in the first half of 2009, but denied earning any appreciable income from these deposits. And, as Nirenberg advised the court, the business practices at the market, the multiple daily acts of zeroing out cash registers, left in doubt the source of the money coming into the store. Under these circumstances, which rendered defendant's prolonged avoidance of his divorce judgment obligations to plaintiff highly suspicious, the circuit court did not abuse its discretion when it appointed Nirenberg to investigate defendant's business income and hold assets to satisfy plaintiff's divorce judgment debt—at least provided that the court joins Shouneyia Brothers as a party to the case.

The identity of Shouneyia Brothers as a corporate entity does not preclude the court's order appointing a receiver to investigate corporate funds and records, once the corporation is joined as a party to the case. Plaintiff made allegations concerning defendant's efforts to defraud her of her divorce judgment debt by *concealing income within Shouneyia Brothers* and offered substantial support for those allegations. The circuit court noted in January 2010 when it first contemplated granting the receivership,

> [t]housands of dollars coming in and out of these accounts and he never has any funds. It may well be that he has no funds. I don't know. . . .
>
> * * *
>
> And if indeed [defendant] has no assets, [the receiver] will report that back to us, but I think [the receiver] needs to have a look.

Notably, defendant does not contest the import of plaintiff's and the receiver's contentions that Frank Shouneyia, defendant's coowner of the corporation, had no objection to the appointment of a receiver over Shouneyia Brothers.[3] The allegations and evidence of record tending to substantiate that defendant, through his control over Shouneyia Brothers, had sought to hide income in Shouneyia Brothers or the market operated by the corporate entity rendered the circuit court's appointment of a receiver to investigate the financial condition of the corporation a decision within the range of principled outcomes, as long as the court joins the Shouneyia Brothers entity as a party to the case. See *Kircher*, 281 Mich App at 273 (noting that a court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes); *Reed*, 265 Mich App at 161-162; *Attica Hydraulic Exch v Seslar*, 264 Mich App 577, 590; 691 NW2d 802 (2004) ("After a judgment for money has been rendered, a trial court has the discretion to appoint a receiver of any

[3] Appellants impugn only the extent of plaintiff's factual support for this proposition, noting in their appellate brief's statement of facts: "Plaintiff offered no explanation of how Frank Shouneyia had consented and no factual support for the proposition that Frank Shouneyia had consented to the receivership." At a March 10, 2010 hearing, defendant did not object or request additional substantiation when plaintiff's counsel advised the court of Frank Shouneyia's consent to the receivership.

property the judgment debtor has or may acquire."). The allegations and evidence of record strongly suggesting that defendant has tried to conceal income in the corporation also make irrelevant appellants' contention that the circuit court could not appoint a receiver over Shouneyia Brothers because it "owe[d] no debt to the judgment creditor [plaintiff]."

Our conclusion finds support in Michigan caselaw. The Michigan Supreme Court decades ago considered several appeals

> aris[ing] out of the receivership pending under the decree of divorce in *Westgate* v. *Westgate*, 291 Mich. 18 [288 NW 860 (1939) (*Westgate I*)]. The appointment of the receiver was upheld by this court in *Westgate* v. *Westgate*, 294 Mich. 88 [292 NW 569 (1940) (*Westgate II*)]; *Westgate* v. *Drake*, 294 Mich. 116 [292 NW 573 (1940) (*Westgate III*)]; and *Westgate* v. *Drake*, 294 Mich. 120 [292 NW 574 (1940) (*Westgate IV*)]. [*Westgate v Larsen*, 296 Mich 434, 435; 296 NW 317 (1941) (*Westgate V*).]

In one of the *Westgate* appeals upholding the receiver's appointment, *Westgate III*, 294 Mich at 117, the Supreme Court summarized the relevant factual background:

> On November 30, 1938, Bertha L. Westgate was awarded a decree of divorce from Elmore L. Westgate with provisions of alimony granting her a one-half interest in all of his rights in an oil business known as the Direct Refinery Stations. Because of her inability to ascertain the exact nature of the ownership of Mr. Westgate in such business, plaintiff filed a petition in the divorce proceedings setting forth that her husband and defendants herein, as well as others, were engaged in a conspiracy to cheat her out of her rights in the business by concealment of property rights and ownership; that Elmore L. Westgate was the real owner of the business but that in order to defraud her he had covered up such interests under the names of others. In her petition, Mrs. Westgate prayed that defendants and

> others be joined as defendants in the proceedings and that they show cause why a temporary receiver should not be appointed for the Direct Refinery Stations.

Unlike in this case, the petition for receivership in *Westgate* asked "for leave to join certain parties as defendants," and "[t]he defendants named in this petition [appeared and] filed answers thereto denying all the material allegations contained in plaintiff's petition." *Westgate II*, 294 Mich at 89-90.

In *Westgate II*, the Supreme Court discussed the general responsibilities of a receiver, and other legal principles, as informative to the question in that case, "whether or not the trial court had a right to make . . . orders awarding attorney fees, the property in question being in the hands of a receiver." *Id*. at 91. In *Westgate III*, 294 Mich at 118, the Supreme Court examined a different question than the receiver appointment challenge presented here, an attack on the validity of a trial court injunction enjoining the defendants "from interfering with the receiver's possession of the premises and business of the Direct Refinery stations." The Court highlighted that the defendants had not challenged the initial order appointing the receiver: "No attack upon the order appointing the receiver is made as far as the record discloses, except in defendants' answer; and they could not attack the validity of such an appointment, or question the extent of the receiver's possession, on a motion which did not raise such an issue." *Id*. at 119. In *Westgate IV*, 294 Mich at 121-122, defendant Nellie Drake, "[o]ne of the parties who filed an answer in . . . [the] receivership action," claimed on appeal "that a certain tractor used in the oil business belongs to her." Drake "raise[d] numerous questions regarding the validity of the appointment of the receiver," among other issues, with respect to which the

Supreme Court ruled, "We are of the opinion that all of these claims are without merit." *Id*. at 123. It does not strike us as entirely clear that the Supreme Court in the *Westgate* appeals cited in this paragraph answered the precise questions appellants raise here. But the *Westgate* decisions at least strongly suggest that in a divorce case, a circuit court may appoint a receiver over a third-party corporation in the face of allegations that one of the divorcing spouses had used the corporate form to conceal assets or funds that could be used to satisfy a judgment debt to the other spouse.

With respect to Shouneyia Brothers's complaint that the company never received proper notice of the receivership in violation of its right of due process, the record reflects that defendant is the registered agent for Shouneyia Brothers. Shouneyia Brothers thus had actual notice of plaintiff's multiple motions to appoint a receiver, as well as the circuit court's order imposing a receivership. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 505; 739 NW2d 656 (2007) ("[D]ue process in civil cases requires notice of the nature of the proceeding.") (quotation marks and citation omitted). Notwithstanding the corporation's actual notice of the relevant proceedings, Shouneyia Brothers made no attempt to be heard by the circuit court in a manner separate from defendant's appearance as an individual. In any event, we are instructing that the circuit court add the corporation as a party to the case.

We conclude that in light of (1) defendant's poor past performance in making any payments due plaintiff under the judgment of divorce, despite the court's employment of methods less drastic than receivership, and (2) plaintiff's showing that defendant exercises control over Shouneyia Brothers and has not accounted for regular, large deposits into the corporation's bank

accounts, the circuit court acted within its discretion by appointing a receiver to preserve funds and property that could satisfy defendant's judgment debt to plaintiff. *Reed*, 265 Mich App at 161-162; *Cohen*, 125 Mich App at 214; see also 65 Am Jur 2d, Receivers, § 33, p 649 ("[A]ppointment of a receiver may be based on a showing of a danger of loss of property through waste, neglect, or misconduct . . . ."); 65 Am Jur 2d, Receivers, § 31, p 648 ("Although proof of fraud is not required to support a court's discretionary decision to appoint a receiver, the prevention of collusion, fraud, or danger of loss or injury from fraud is ground for the appointment of a receiver.").

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

CG AUTOMATION & FIXTURE, INC v AUTOFORM, INC

Docket No. 286361. Submitted May 11, 2010, at Grand Rapids. Decided January 20, 2011, at 9:00 a.m.

C.G. Automation & Fixture, Inc., brought an action under the molder's lien act, MCL 445.611 *et seq*., in the Kent Circuit Court against Autoform, Inc., Key Plastics L.L.C., and others, seeking possession of several molds and dies that Autoform had ordered from C.G. Automation, then sold to Key Plastics without having paid for them. When C.G. Automation delivered the dies at issue to Autoform, it included information identifying itself as the moldbuilder pursuant to MCL 445.619(1), but it affixed this information to the separate metal risers used to adjust the dies' height, not to the dies themselves. Autoform did not include these risers when it shipped the dies to Key Plastics. C.G. Automation had initially sought possession of the dies under the Special Tools Lien Act, MCL 570.541 *et seq*., and also brought various common-law claims that were ultimately dismissed against all defendants except Autoform. The court, James Robert Redford, J., entered a default judgment against Autoform and in favor of C.G. Automation. C.G. Automation filed a second amended complaint against the remaining defendants and moved for immediate possession of the dies under the molder's lien act. The court granted the motion with respect to the dies at issue, and Key Plastics appealed by leave granted.

The Court of Appeals *held*:

An enforceable molder's lien demands the presence of permanently affixed details identifying the moldbuilder on the mold, die, or tool. The circuit court clearly erred by finding that C.G. Automation had fulfilled this requirement, given that the required identification was affixed to objects that were readily removable from the dies.

Reversed and remanded for further proceedings.

GLEICHER, J., concurring, additionally wrote separately to recommend that the Legislature clarify the ambiguity created by the disjunctive language in MCL 445.619(4), which indicates that a moldbuilder's lien attaches when actual or constructive notice is received, and the conjunctive language in MCL 445.619(3), which

states that fulfilling the requirements of the previous two subsections gives rise to both actual and constructive notice.

LIENS — MOLDER'S LIENS — MOLDER'S LIEN ACT — MOLDBUILDERS' IDENTIFICATION — PERMANENTLY RECORDED MOLDBUILDERS' IDENTIFICATION.

The molder's lien act requires a moldbuilder to permanently record on every die, mold, or form the moldbuilder's name, street address, city, and state; this requirement demands the presence of permanently affixed details on the mold, die, or tool itself for an enforceable lien to be created (MCL 445.619[1], [3]).

Bolhouse, Vander Hulst, Risko, Baar & Lefere, P.C. (by *David S. Lefere*), for C.G. Automation & Fixture, Inc.

Harvey Kruse, P.C. (by *J. Kenneth Wainwright, Jr.*, *William F. Rivard*, and *Kimberly A. Kardasz*), for Key Plastics L.L.C.

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

GLEICHER, J. We granted leave in this case to consider a question of first impression arising under the Michigan ownership rights in dies, molds, and forms act, MCL 445.611 *et seq*., also known as the molder's lien act. The precise question before us is whether an enforceable molder's lien attaches absent some form of permanently recorded information on the mold, die, or tool identifying the name of the moldbuilder, its street address, city, and state. We hold that an enforceable lien demands the presence of permanently affixed identifying details on the mold, die, or tool and that the dies at issue lacked this essential record. We reverse the circuit court's ruling to the contrary and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

Plaintiff, C.G. Automation & Fixture, Inc., manufactures tool and die equipment and sells its products to

automobile parts suppliers. Defendants Key Plastics L.L.C. and Autoliv A.S.P., Inc., supply parts to automobile manufacturers. Autoliv agreed to sell defendant Chrysler L.L.C. spoke covers for use in its JS41 vehicle platform. Chrysler applied the spoke covers as decorative features on the spokes of Chrysler Sebring steering wheels.

In September 2005, Autoliv sent Key Plastics a letter of intent to purchase spoke covers for JS41 vehicles. Defendant Autoform, Inc., quoted Key Plastics a price for the tooling necessary to manufacture the JS41 components. The tooling included production molds and metal trim dies. Key Plastics agreed to buy the tooling at the price quoted by Autoform. Autoform then turned to C.G. Automation for the design, fabrication, and manufacture of a portion of the JS41 tooling that Autoform had agreed to sell Key Plastics. C.G. Automation duly produced the required molds and dies and provided them to Autoform. The dispute before us concerns only the dies.

In September 2006, C.G. Automation shipped the dies to Autoform. On the date of shipment, C.G. Automation placed an identification tag on the risers accompanying the dies. According to Michael Elliott, C.G. Automation's plant supervisor, a riser is

> a precise metal bar that is machined and bolted to the bottom of the tool to establish a shut height or a tool shut height. You buy the die set . . . . If it doesn't meet the required shut height, you put risers underneath it, and you bolt them to the bottom, so when they go into a press, they meet a certain shut height.[1]

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[1] "*Die shut height* is defined as the height of the die in the shut or closed position." Smith, *Quick Die Change* (Dearborn: Society of Manufacturing Engineers, 2d ed, 2004), ch 11, p 237. "In general, the shut height of a press is the maximum die height that can be accommodated

Elliott admitted that the risers could be removed from the die and transferred to another tool. Nonetheless, Elliott characterized "the risers" as "part of the die." When C.G. Automation shipped the dies to Autoform, C.G. Automation also filed a financing statement under the Uniform Commercial Code (UCC) identifying its possession of a lien on the tooling.

Autoform never paid C.G. Automation for the dies, and Autoform entirely ceased its operations in 2007. However, before Autoform closed its doors, it sold the dies to Key Plastics.[2] The parties agree that the dies arrived at the Key Plastics facility without the tagged risers. The dies currently reside in a Key Plastics plant in Pennsylvania, where the company has used them since 2007 in the manufacture of JS41 plastic parts. The record does not reveal the current location of the risers formerly attached to the dies.

In September 2007, C.G. Automation sued Autoform, Key Plastics, Autoliv, and Chrysler pursuant to the Special Tools Lien Act, MCL 570.541 *et seq*., and moved for immediate possession of the tooling. C.G. Automation's complaint also alleged breach-of-contract and unjust-enrichment claims. C.G. Automation later amended its pleadings by adding a claim under the molder's lien act. In November 2007, the circuit court denied the motion for immediate possession and entered a stipulated order dismissing the breach-of-contract and unjust-enrichment claims against Key Plastics, Autoliv, and Chrysler. Subsequently, the circuit

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for normal operation . . . ." Auto/Steel Partnership, Stamping Task Force, *Selected Stamping and Formability Measurements*, § 3.1.2 <http://www.a-sp.org/database/viewsec.asp?sec=594> (accessed October 5, 2010).

[2] Key Plastics and Autoform fought a separate legal battle over the dies in the Washtenaw Circuit Court. They resolved their differences after Key Plastics agreed to pay Autoform for the tooling.

court entered a default judgment against Autoform and in favor of C.G. Automation.

In February 2008, C.G. Automation filed a second amended complaint and moved to enforce the molder's lien act and take immediate possession of the tooling if payment in full was not rendered. In May 2008, the circuit court conducted an evidentiary hearing, at which several witnesses testified. In a June 2008 written opinion and order, the circuit court explained, in pertinent part, that it would grant C.G. Automation's motions:

> 3. The testimony of the representatives of C. G. Automation are that the devices that left their plant . . . had the markings which are required to be on a device pursuant to MCL 445.619(4) and UCC lien registrations were filed by C. G. Automation. This testimony was credible and believed by the Court.
>
> 4. As a result of the identification tags being placed . . . and the UCC liens being registered for the devices . . . the plaintiffs [sic] are entitled to immediate possession and/or payment by the entity in possession of the [dies].

In October 2008, this Court granted Key Plastics' application for leave to appeal. *CG Automation & Fixture, Inc v Autoform, Inc*, unpublished order of the Court of Appeals, entered October 24, 2008 (Docket No. 286361).

II. ANALYSIS

The construction and application of the molder's lien act presents a question of law that this Court considers de novo on appeal. *Delta Engineered Plastics, LLC v Autolign Mfg Group, Inc*, 286 Mich App 115, 119; 777 NW2d 502 (2009). We review for clear error a circuit court's findings of fact. MCR 2.613(C). "Clear error exists when the reviewing court is left with a definite

and firm conviction that a mistake has been made." *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

In *Gateplex Molded Products, Inc v Collins & Aikman Plastics, Inc*, 260 Mich App 722, 726; 681 NW2d 1 (2004), another case arising under the molder's lien act, we restated the following general principles governing statutory interpretation:

> The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. [Citation and quotation marks omitted.]

In this case, the parties ask that we construe several sections of the molder's lien act and determine whether, when harmonized, the act supports the imposition of a molder's lien. In undertaking this task, we must avoid construing the statute in a manner that renders any statutory language nugatory or surplusage. *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). When discerning legislative intent, we read the entire act and interpret a particular word in one statutory section only "after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922). This Court considers both the plain meaning of critical words or phrases comprising the statute and their placement and purpose in the statutory scheme. *People v Blunt*, 282 Mich App 81, 84; 761 NW2d 427 (2009). In

summary, "[w]e construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006) (citation and quotation marks omitted).

The pertinent portion of the molder's lien act, MCL 445.619, states as follows:

> (1) A moldbuilder shall permanently record on every die, mold, or form that the moldbuilder fabricates, repairs, or modifies the moldbuilder's name, street address, city, and state.
>
> (2) A moldbuilder shall file a financing statement in accordance with the requirements of section 9502 of the uniform commercial code, 1962 PA 174, MCL 440.9502.
>
> (3) A moldbuilder has a lien on any die, mold, or form identified pursuant to subsection (1). The amount of the lien is the amount that a customer or molder owes the moldbuilder for the fabrication, repair, or modification of the die, mold, or form. The information that the moldbuilder is required to record on the die, mold, or form under subsection (1) and the financing statement required under subsection (2) shall constitute actual and constructive notice of the moldbuilder's lien on the die, mold, or form.
>
> (4) The moldbuilder's lien attaches when actual or constructive notice is received. The moldbuilder retains the lien that attaches under this section even if the moldbuilder is not in physical possession of the die, mold, or form for which the lien is claimed.
>
> (5) The lien remains valid until the first of the following events takes place:
>
> (a) The moldbuilder is paid the amount owed by the customer or molder.
>
> (b) The customer receives a verified statement from the molder that the molder has paid the amount for which the lien is claimed.

(c) The financing statement is terminated.

The plain language of MCL 445.619(1) dictates that a moldbuilder permanently record identifying information on every die, mold, or form it produces. The statute does not define the term "permanently record." "When considering a word or phrase that has not been given prior legal meaning, resort to a lay dictionary such as *Webster's* is appropriate." *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007) (citation and quotation marks omitted). According to *Random House Webster's College Dictionary* (1997), p 971, the relevant definitions of "permanent" include "1. existing perpetually; everlasting," "2. intended to serve, function, etc., for a long, indefinite period," and "3. long-lasting or nonfading[.]" The relevant definition of "record" is "1. to set down in writing or the like, as for the purpose of preserving evidence." *Id*. at 1087.

In MCL 445.619(2), our Legislature adopted a second requirement, which is that the moldbuilder file a financing statement in conformity with MCL 440.9502, part of the UCC. In MCL 445.619(1) and (2), the Legislature clearly and unambiguously commanded that moldbuilders seeking an enforceable lien undertake two actions: "permanently record" specified identifying information on every die, mold, or form and "file a financing statement" under the UCC. Thus, the introductory subsections of the statute, (1) and (2), set forth two obligations relevant to the creation of a lien and its attachment. By placing these mandates at the beginning of the statute, the Legislature meant to convey that a moldbuilder seeking the benefits conveyed in the balance of the statute must comply with the predicate requirements.

Subsection (3) begins, "A moldbuilder has a lien on any die, mold, or form identified pursuant to subsection

(1)." MCL 445.619(3). This is the only portion of the statute directly addressing the *creation* of a lien. Notably, the Legislature elected not to create a lien effected through the filing of a financing statement. It could have done so by adding a second sentence here, stating to the effect that "a moldbuilder has a lien on any die identified pursuant to subsection (2)." Moldbuilder's liens are nonconsensual, and they exist even absent privity of contract. Because those who ultimately acquire the tooling may have never agreed to a lien or entered into a security agreement with the moldbuilder, as occurred in this case, the statute creates a remedial security interest in the moldbuilder.

After addressing the amount of a moldbuilder's lien in subsection (3), the statute turns to the manner in which the moldbuilder must supply the world with *notice* of the lien it acquired by complying with subsection (1). The third sentence of subsection (3) reads, "The information that the moldbuilder is required to record on the die, mold, or form under subsection (1) *and* the financing statement required under subsection (2) shall constitute actual *and* constructive notice of the moldbuilder's lien . . . ." MCL 445.619(3) (emphasis added). With this sentence, the Legislature indicated that a moldbuilder who complies with both requirements has given the world actual and constructive notice of the lien.

Having established the legal components of an enforceable molder's lien, we now consider whether the circuit court clearly erred by finding that C.G. Automation had permanently recorded identifying information on the dies. The record evidence agreed that C.G. Automation permanently affixed its identifying information to metal risers that could be separated from the dies and transferred for use with other tools. A Key Plastics engineer testified that

the risers "are just steel spacers that [sic] if you needed to adjust heights for some reason, but they would not be necessarily specific to a specific die." Although a C.G. Automation plant supervisor insisted at one point during the evidentiary hearing that the risers constitute a "part of the die[s]," substantial other evidence refutes this pronouncement. Abundant evidence establishes that a riser is not a die, but a separate and distinct device used in conjunction with a die. The two serve entirely different functions. "To treat them as synonymous . . . would be reminiscent of Lewis Carroll's Humpty-Dumpty as he scornfully chastised Alice 'when I use a word it means just what I choose it to mean—neither more nor less.' " *Maki v East Tawas*, 385 Mich 151, 159; 188 NW2d 593 (1971).

By directing moldbuilders to "permanently record on every die, mold, or form" identifying information, MCL 445.619(1), the Legislature clearly intended that subsequent possessors of a die would receive actual notice of the name and address of the moldbuilder. The Legislature elected to achieve this end by requiring a die fabricator to perpetually preserve its identity "*on* every die . . . ." *Id*. (emphasis added). The circuit court's determination that a moldbuilder could comply with the statutory mandate by permanently affixing its information to objects readily removable from the dies contravenes the plain meaning of MCL 445.619(1). Furthermore, the fact that Key Plastics has successfully used the dies without the accessory risers confirms that the risers simply are not equivalent to the dies. Consequently, our review of the entire relevant record leaves us with the definite and firm conviction that the circuit court made a mistake by finding that C.G. Automation had placed its identifying information on the dies. See *Massey*, 462 Mich at 379. Because C.G. Automation failed to perfect its lien in the manner prescribed under

MCL 445.619, we reverse the decision of the circuit court and remand for proceedings consistent with this opinion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

GLEICHER, J. (*concurring*). I fully concur in the majority opinion, but write separately to express my belief that MCL 445.619(4) renders that section of the molder's lien act ambiguous. In my view, legislative reconsideration of the statutory language would benefit the tool-and-die and automotive industries as well as the legal community.

In MCL 445.619(1) and (2), the Legislature clearly and unambiguously commanded that molders seeking an enforceable lien undertake two mandatory actions by stating in subsection (1) that "[a] moldbuilder shall permanently record" specified identifying information on every die, mold, or form and in subsection (2) that "[a] moldbuilder shall file a financing statement" under MCL 440.9502. However, at this point the waters of statutory interpretation become muddied. Subsection (3) envisions that a moldbuilder will have "a lien on any die, mold, or form identified pursuant to subsection (1)." MCL 445.619(3). One reasonable interpretation of this language suggests that even absent the moldbuilder's filing of a financing statement, the moldbuilder will have acquired an enforceable lien if it has permanently affixed identifying information on the tool. But subsection (3) then continues, "The information that the moldbuilder is required to record on the die, mold, or form under subsection (1) *and* the financing statement required under subsection (2) shall constitute actual *and* constructive notice of the moldbuilder's lien . . . ." *Id*. (emphasis added). This sentence reasonably lends itself to construction in either of two

ways. The first is that the combination of permanent moldbuilder identification and the filing of a financing statement under the Uniform Commercial Code (UCC) together amount to actual and constructive notice of a lien. Alternatively, the Legislature perhaps intended that permanent identification constitutes actual notice, while a filed UCC statement equates with constructive notice; acceptance of this second reading would essentially obligate a court to engraft onto the final clause of subsection (3) the notion that the permanent recording and the UCC filing "shall constitute actual and constructive notice[, *respectively*,] of the moldbuilder's lien . . . ." Adoption of the second reading of subsection (3) thus would ignore the well-established principle of statutory construction that a court "is not free to add language to a statute or to interpret a statute on the basis of this Court's own sense of how the statute should have been written." *Kirkaldy v Rim*, 478 Mich 581, 587; 734 NW2d 201 (2007) (CAVANAGH, J., concurring); see also *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998) (emphasizing that "[a] court must not judicially legislate by adding into a statute provisions that the Legislature did not include").

Subsection (4) intensifies the interpretive difficulties presented by the molder's lien act. That subsection provides that a moldbuilder's lien attaches "when actual *or* constructive notice is received." MCL 445.619(4) (emphasis added). In the estimation of federal bankruptcy judge Phillip J. Shefferly, who construed the molder's lien act in *In re Plastech Engineered Prod, Inc*, 418 BR 235, 245 (ED Mich Bankr, 2009), subsections (3) and (4), when read together, render the statute "inescapably ambiguous."[1] Judge Shefferly reasoned:

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[1] Although this Court may choose to agree with the analysis of a federal court decision, "federal court decisions are not precedentially binding on

> Sub[section] 4 injects an additional element of doubt in construing the statutes by providing that the lien "attaches when actual or constructive notice is received." The problem caused by this language is that under subsection 3, the references to the information required to be inscribed on the tooling and the financing statement required to be filed are written with the conjunctive *and*, which suggests that both acts together constitute actual and constructive notice of the lien. However, subsection 4 arguably calls this construction into question by using the disjunctive *or* between "actual" and "constructive" notice. The disjunctive *or* in this sentence suggests that there might be actual notice without constructive notice and vice versa. In other words, if the lien can attach when there is only the actual notice provided by the inscription on the tooling, does this mean that attachment can occur without the constructive notice that a UCC financing statement provides? Similarly, if there is only a UCC financing statement that provides the constructive notice, can attachment occur without the actual notice that is provided by the inscription on the tooling? [*Id*. at 244.]

Judge Shefferly resolved the statute's apparent ambiguity by examining its structure, legislative history, applicable caselaw, and secondary sources. *Id*. at 244-247. He concluded that MCL 445.619 "require[s] a two step process in order to obtain an enforceable lien: the permanent recording of information on the mold or tool, *and* the filing of a financing statement in accordance with section 9502 of the UCC." *Id*. at 247 (emphasis added). Judge Shefferly's reconciliation of the statutory language is entirely consistent with the result we reach today.

Our Supreme Court has emphasized that "[a] provision of the law is ambiguous only if it irreconcilably conflicts with another provision or when it is *equally*

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questions of Michigan law . . . ." *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 364; 604 NW2d 330 (2000).

susceptible to more than a single meaning." *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177-178 n 3; 730 NW2d 722 (2007) (brackets and quotation marks omitted). I would hold that with regard to whether a molder's lien exists in the absence of a UCC filing statement, the statutory language is equally susceptible to more than a single meaning. I agree entirely with the sentiments expressed in an article published in the November 2010 *Michigan Bar Journal* that the molder's lien act is "in desperate need of overhaul" and that amendment "would foster more predictability in judicial construction and interpretation of the statutory language . . . ." Mears, *Amending the Michigan tooling lien statutes*, 89 Mich B J 11, 40 (Nov 2010). Nevertheless, I believe that the statute clearly and unambiguously envisions that absent the permanent recording of identifying information, a moldbuilder possesses no lien.

In re LUNDY ESTATE

Docket No. 292930. Submitted December 14, 2010, at Detroit. Decided January 20, 2011, at 9:05 a.m.

As personal representative of the estate of David G. Lundy, deceased, Bridget A. Lundy petitioned the Lenawee Probate Court for the return of estate funds, specifically a certificate of deposit account that First Federal Bank of the Midwest had liquidated after Bridget Lundy applied for informal probate. The bank claimed a priority interest under an assignment granting it a security interest in the funds, which it had perfected. The court, Frederick L. Wood, J., held that because probate proceedings had commenced, the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., rather than article 9 of the Uniform Commercial Code (UCC), MCL 440.9101 *et seq.*, applied and that Lundy's claim for homestead and family allowances had priority over the bank's claim. Respondent appealed.

The Court of Appeals *held*:

The decedent and the bank entered into a transaction and created a security interest in the account. Article 9 of the UCC governs security interests. MCL 700.3104 precludes all proceedings to enforce a claim against an estate before the appointment of a personal representative except a proceeding brought by a secured creditor of the decedent to enforce the creditor's right to the creditor's security. Those claims are governed by the provisions of part 8 of article III and part 6 of article VII of EPIC. MCL 700.3809 governs the obligations of the personal representative in paying the claims of secured creditors, and no provision requires a secured creditor that is otherwise entitled to exhaust a security to first bring a claim against the estate in order to be permitted to exhaust the security. Because the bank had perfected a security interest in the funds, it was not required to bring a claim against the estate but was entitled to exhaust the security in order to reduce the principal amount of the loan upon default, even though there will be insufficient funds in the estate to pay the priority claims and allowances set forth in MCL 700.3805.

Reversed.

SECURED TRANSACTIONS — CLAIMS AGAINST ESTATES — SECURED CREDITORS — PRIORITY.

The Estates and Protected Individuals Code (EPIC) precludes all proceedings to enforce a claim against an estate before the appointment of a personal representative except a proceeding brought by a secured creditor of the decedent to enforce the creditor's security; security interests are governed by article 9 of the Uniform Commercial Code, and no provision of EPIC requires a secured creditor that is otherwise entitled to exhaust a security to first bring a claim against the estate in order to be permitted to exhaust the security upon default, even though there will be insufficient funds in the estate to pay priority claims and allowances (MCL 440.9101 *et seq.*; MCL 700.3104, 700.3805, 700.3809).

Morello Law Group, P.C. (by *George S. Fekaris*), for Bridget A. Lundy.

Mittelstaedt and McNeely, P.C. (by *Christopher E. McNeely* and *Andrew M. White*), for First Federal Bank of the Midwest.

Before: DONOFRIO P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM. Respondent, First Federal Bank of the Midwest (the bank),[1] appeals as of right the probate court order granting the petition for return of estate funds filed by petitioner, Bridget A. Lundy, as personal representative of the estate of David Gary Lundy. This case arises from a dispute over the funds in a certificate of deposit (CD) account that belonged to the decedent. At issue is the interplay between the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, article 9 of the Uniform Commercial Code (UCC), MCL 440.9101 *et seq.*, and the terms of an "Assignment of Deposit Account" (the assignment agreement) be-

[1] First Federal Bank of the Midwest was formerly known as the Bank of Lenawee.

tween the bank and the decedent in determining whether a bank, as the holder of a perfected security interest in a CD account that a decedent pledged as collateral to secure a mortgage, is entitled upon default to retain the funds in the account even though there are insufficient funds in the estate to pay the priority claims and allowances set forth in MCL 700.3805 of EPIC. We reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

On December 22, 2005, the decedent personally guaranteed a mortgage and promissory note between Lundy's Lane, L.L.C.,[2] and the bank. On that date, the decedent and the bank also entered into the assignment agreement, which granted the bank a security interest in the CD account as collateral for the loan.[3] According to the terms of the assignment agreement, upon occurrence of an "Event of Default," the bank had the right to exercise one or more of the rights and remedies enumerated in the assignment agreement. Upon de-

[2] Lundy's Lane, L.L.C. is apparently a convenience store owned by the decedent, his son Gary A. Lundy, or both.

[3] The assignment agreement provided as follows:

> ASSIGNMENT. For valuable consideration, Grantor assigns and grants to Lender a security interest in the Collateral, including without limitation the deposit accounts described below, to secure the indebtedness and agrees that Lender shall have the rights stated in this Agreement with respect to the Collateral, in addition to all other rights which Lender may have by law.
>
> COLLATERAL DESCRIPTION. The word "Collateral" means the following described deposit account ("Account"):
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> CD Account in the name of David G. Lundy
>
> together with (A) all interest, whether now accrued or hereafter accruing; (B) all additional deposits hereafter made to the Account; (C) any and all proceeds from the Account; and (D) all renewals, replacements and substitutions for any of the foregoing.

fault, the rights and remedies provided in the assignment agreement allowed the bank to accelerate the indebtedness to make it immediately due and payable without notice. The assignment agreement also provided the bank the right to take all funds in the CD account and to apply the funds to the indebtedness. Any excess funds remaining after application of the CD account proceeds to the indebtedness would be paid to the decedent.

The decedent died testate on February 20, 2008. On April 24, 2008, Bridget A. Lundy applied for informal probate and for appointment of a personal representative. She was appointed personal representative of the estate on that same date.

The decedent defaulted on the loan,[4] and the bank exercised its rights under the assignment agreement. The bank liquidated the CD account and applied the funds to reduce the principal amount of the loan secured by the CD account.[5]

On May 19, 2008, petitioner filed a form selecting the CD account as the "homestead allowance authorized by

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[4] The decedent defaulted on the loan by failing to make payments as they became due. Additionally, the terms of the assignment agreement identified "death" as an event of default.

[5] By letter dated April 30, 2008, addressed to Gary A. Lundy, the bank, through Vice President John Selenko, informed Lundy that the mortgage was in default and that the bank had exercised its rights under the assignment agreement and had liquidated the CD account and applied the funds to reduce the principal amount of the loan secured by the CD account. Selenko wrote in the letter that he had had "numerous conversations" with the decedent regarding the loans and that the decedent "had verbally agreed in February to allow the bank to liquidate his certificate of deposit to bring all of the loans current and pay down the principal balance of the real estate loan." Selenko claimed that the bank "held off liquidating" the account pending some negotiations concerning a lease of the store, which had apparently ceased with the decedent's death.

MCL 700.2402" and as the "exempt property authorized by MCL 700.2404." Fields for a family allowance were also completed on the form, as follows: "A family allowance of $23,000.00 per year has been determined as authorized by MCL 700.2403 and MCL 700.2405." On August 14, 2008, petition filed an inventory listing only "Claim on Proceeds of CD Held By First Federal Bank" and listing "[$]0.00" as the total value of the property.

Petitioner commenced this action with the filing of a "Petition for Return of Estate Funds" on January 9, 2009. She asserted that under MCL 700.3805 of EPIC, the bank's security interest in the CD account was of lower priority than the surviving spouse's claim for reimbursement of reasonable funeral expenses, the homestead allowance, the family allowance, and exempt property. In response, the bank asserted that because the bank had properly perfected its security interest in the CD account, the bank had an interest superior to any and all claims to the same collateral. Thus, the bank contended that it had properly applied the balance of the CD account to the obligation secured by the account pursuant to MCL 440.9607(1)(d) of the UCC.

At a hearing on the petition, the probate court acknowledged that the bank had a perfected security interest in the CD account. The court opined that the bank had the right to apply the balance of the CD account to the obligation secured by the account "prior to the death of the decedent, or, perhaps even prior to the spouse filing an affidavit for information Probate and being appointed personal representative." The court concluded, however, that EPIC superseded article 9 of the UCC once a personal representative was appointed. Thus, the court concluded that, under EPIC, "the surviving spouse has the right to claim homestead

and family allowance prior to a creditor's claim, and, that is what the bank had."

II. STANDARD OF REVIEW

This Court reviews de novo issues of statutory interpretation as questions of law. *In re Clarence W Temple & Florence A Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). An appeal of a decision of the probate court, however, is on the record; it is not reviewed de novo. *Id.*; MCL 600.866(1); MCR 5.802(B)(1). This Court reviews the probate court's factual findings for clear error and its dispositional rulings for an abuse of discretion. *Temple*, 278 Mich App at 128.

III. THE PURPOSES OF ARTICLE 9 OF THE UCC AND EPIC

Subject to several exceptions, article 9 of the UCC as enacted in Michigan governs, among other things, "[a] transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract." MCL 440.9109(1)(a). It governs such things as perfection of security interests, MCL 440.9301 to MCL 440.9316, priority of security interests, MCL 440.9317 to MCL 440.9339, and rights of third parties, MCL 440.9401 to MCL 440.9409.

The purposes of EPIC include "[t]o discover and make effective a decedent's intent in distribution of the decedent's property" and "[t]o promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors." MCL 700.1201(b) and (c). The provisions relevant to this case are within article III of EPIC, MCL 700.3101 *et seq.*, which governs probate of wills and estate administration.

IV. ARTICLE 9 OF THE UCC AND THE ASSIGNMENT AGREEMENT

The record reveals that the decedent and the bank voluntarily entered into a transaction and intentionally created a security interest in the CD account. Article 9 of the UCC provides the scheme by which security interests in personal property are regulated. *Shurlow v Bonthuis*, 456 Mich 730, 735; 576 NW2d 159 (1998). Specifically, MCL 440.9607(1) of the UCC provides:

> If so agreed, and in any event after default, a secured party may do 1 or more of the following:
>
> * * *
>
> (d) If it holds a security interest in a deposit account perfected by control under [MCL 440.9104(1)(a)],[6] apply the balance of the deposit account to the obligation secured by the deposit account.

Under this section, upon default the bank had a right to apply the balance of the CD account to the obligation secured by the CD account. The bank's action was permitted under the terms of the assignment agreement, which provided that the death of the borrower or grantor constituted an event of default. The assignment agreement provided several "Rights and Remedies on Default," including the right of the bank to "surrender the Account to the Issuer and obtain payment thereunder subject to any early withdrawal penalty imposed by the Issuer" and to "obtain all funds in the Account from the Issuer of the Account and apply them to the

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[6] MCL 440.9104(1) provides:

> A secured party has control of a deposit account if 1 or more of the following apply:
>
> (a) The secured party is the bank with which the deposit account is maintained.

indebtedness in the same manner as if the Account had been issued by Lender." There is no dispute that the bank, in addition to being the "lender," was also the holder or issuer of the deposit account. The bank was entitled under article 9 of the UCC and the assignment agreement to apply the balance of the CD account to the obligation secured by the account (the mortgage) because the bank held the deposit account.

V. EPIC

EPIC treats secured creditors differently than other potential claimants against an estate. MCL 700.3104 provides:

> (1) Except as otherwise provided in subsection (2), a proceeding to enforce a claim against a decedent's estate or the decedent's successors shall not be revived or commenced before the appointment of a personal representative. . . .
>
> (2) This act does not apply to a proceeding by a secured creditor of the decedent to enforce the creditor's security except as provided in part 8 of article III and part 6 of article VII.[7]

This provision precludes all proceedings to enforce a claim against the estate before the appointment of a personal representative except a proceeding brought by a secured creditor of the decedent to enforce the creditor's right to the creditor's security. EPIC does not apply to such claims except as provided in two specific parts of EPIC.[8] The comment to MCL 700.3104 by the reporter for the EPIC drafting committee of the State

[7] Part 8 of article III is found at MCL 700. 3801 through MCL 700.3815. Part 6 of article VII is found at MCL 700.7601 through MCL 700.7615.

[8] The provisions of part 8 of article III are relevant here and are discussed in this portion of the opinion; article VII pertains to trust administration and is not relevant here.

Bar of Michigan explains that this section "subjugates the rights of creditors to the provisions of EPIC, except for secured creditors, who may proceed against the secured property. Even for a secured creditor, the code governs any attempt to recover an amount in excess of the security." *Estates and Protected Individuals Code With Reporter's Commentary* (ICLE, 2008 ed), p 154 (*EPIC With Reporter's Commentary*). While not binding, such comments are often used to aid in the interpretation of a statute or rule. See *People v Clement*, 254 Mich App 387, 391-392; 657 NW2d 172 (2002); *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 585; 644 NW2d 54 (2002).

Secured creditors are also treated differently than other potential claimants, including other creditors, in part 8 of article III of the EPIC. MCL 700.3801(1) requires a notice "notifying estate creditors to present their claims within 4 months after the date of the notice's publication or be forever barred." MCL 700.3803 limits the time for presenting claims and bars claims against the estate unless presented within specified time limits. MCL 700.3803(3)(a), however, expressly exempts "[a] proceeding to enforce a mortgage, pledge, or other lien on estate property" from the time limitations. The reporter's supplemental comment for 2005 to MCL 700.3801 explains, in relevant part:

> While a secured creditor is known, frequently notice is not given to secured creditors because § 3803(3)(a), MCL 700.3803(3)(a), permits a secured creditor to collect its claim without regard to the shortened statute of limitations of § 3803, MCL 700.3803. *The secured creditor, however, has a priority position only as to the asset in which the security interest is held. If the security is inadequate, the creditor has no preference when trying to collect any deficiency.* Therefore, when there is uncertainty whether the security is sufficient to cover the secured creditor's claim,

> the personal representative should give actual notice to the secured party. If no notice is given, the secured party may assert that the three-year statute of limitations of § 3803(1)(c), MCL 700.3803(1)(c), applies to a recovery of the deficiency. [*EPIC With Reporter's Commentary*, p 226 (emphasis added).]

Petitioner presumably disputes the emphasized portion of the commentary. Although petitioner concedes that the bank is a secured creditor, she asserts that the bank has *no* priority position, except as between the bank and a hypothetical second unsecured creditor, when the estate does not have sufficient funds to pay all claims and allowances. Petitioner relies primarily on MCL 700.3805 in support of this assertion. MCL 700.3805 sets forth the priority of claim payments. MCL 700.3805(1) provides:

> If the applicable estate property is insufficient to pay all claims and allowances in full, the personal representative shall make payment in the following order of priority:
>
> (a) Costs and expenses of administration.
>
> (b) Reasonable funeral and burial expenses.
>
> (c) Homestead allowance.
>
> (d) Family allowance.
>
> (e) Exempt property.
>
> (f) Debts and taxes with priority under federal law, including, but not limited to, medical assistance payments that are subject to adjustment or recovery from an estate under section 1917 of the social security act, 42 USC 1396p.
>
> (g) Reasonable and necessary medical and hospital expenses of the decedent's last illness, including a compensation of persons attending the decedent.
>
> (h) Debts and taxes with priority under other laws of this state.
>
> (i) All other claims.

MCL 700.3809, which governs secured claims, in addition to MCL 700.3801, reveals that petitioner's assertion is incorrect in part. That is, without even making a "claim" against the estate, the bank has a priority position with respect to the secured property. However, the bank is in the same position as other creditors with respect to any claim against the estate for the amount of any deficiency existing after exhausting the security. MCL 700.3809.[9] Like MCL 700.3805, MCL 700.3809 governs the obligations of the *personal representative* in paying *claims*. No provision requires a secured creditor that is otherwise entitled to exhaust a security to first bring a claim against the estate in order to be permitted to exhaust the security. Indeed, MCL 700.3809 contemplates that the secured creditor may exercise that option. Once again, the commentary is helpful:

> *If a secured creditor surrenders the security interest, he or she becomes a general creditor with priority equal to that of other general creditors to be paid for the full amount of the claim. If, instead, the secured creditor realizes against (collects from) the asset that secures the claim but is not*

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[9] MCL 700.3809 provides:

> A personal representative shall pay a secured claim on the basis of the amount allowed if the creditor surrenders the security. Otherwise, the personal representative shall pay on the basis of 1 of the following:
>
> (a) *If the creditor exhausts the security before receiving payment, upon the amount of the claim allowed less the fair value of the security.*
>
> (b) If the creditor does not have the right to exhaust the security *or has not done so*, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement under which the security was delivered to the creditor or by the creditor and personal representative by agreement, arbitration, compromise, or litigation. [Emphasis added.]

> *fully paid, he or she becomes a general creditor to the extent of the deficiency*. If the secured creditor is given notice as required by §3801(2), MCL 700.3801(2), the secured creditor needs to file a contingent claim within the claims period to preserve his or her rights to collect any deficiency if the security is insufficient to pay the claim. If not given notice, the secured creditor is not barred by the short four-month statute of limitations. [Reporter's Supplemental Comment—2005 to MCL 700.3809, in *EPIC With Reporter's Commentary*, p 235 (emphasis added).]

The secured creditor's special position with respect to the secured property is also reflected in MCL 700.3812, which provides: "An execution shall not issue upon nor shall a levy be made against estate property under a judgment against a decedent or personal representative. *This section shall not be construed to prevent the enforcement of a mortgage, pledge, or lien upon property in an appropriate proceeding*." (Emphasis added.) Finally, MCL 700.3814 allows the personal representative discretion in dealing with an encumbered estate asset, but in no way suggests that an encumbrance may be disregarded if the asset is needed to satisfy the priorities set forth in MCL 700.3805.[10] In sum, none of these provisions prevents the secured creditor from exhausting the security. On the contrary, they treat a secured creditor differently and contem-

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[10] MCL 700.3814 provides:

> If property of the estate is encumbered by mortgage, pledge, lien, or other security interest and it appears to be in the estate's best interest, the personal representative may pay the encumbrance or a part of the encumbrance, renew or extend an obligation secured by the encumbrance, or convey or transfer the property to the creditor in satisfaction of the lien, in whole or in part, whether or not the encumbrance holder has presented a claim. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered property unless the distributee is entitled to exoneration.

plate a secured creditor's right to collect from the security without bringing a claim against the estate for estate funds.

Two states that have probate codes modeled after the Uniform Probate Code, like EPIC, have rendered decisions consistent with our analysis regarding the appropriate treatment of secured creditors under EPIC. In *In re Larson Estate*, 359 NW2d 281 (Minn App, 1984), the Minnesota Court of Appeals addressed the estate's argument that a bank improperly sought payment of its secured claim from the estate's assets rather than proceeding against the security. The court construed provisions of the Minnesota probate code that are similar to the provisions of EPIC relevant in this case:

> The probate code permits the personal representative authority to pay a secured claim in three ways. The personal representative may pay the claim in whole or in part; renew or extend the secured obligation; or convey or transfer assets to the creditor in satisfaction of the lien, whether or not the holder has filed a claim. Minn.Stat. § 524.3-814 (1982).
>
> For the secured creditor who seeks payment, the code provides three options. Minn.Stat. § 524.3-809. First, payment is to be made upon the basis of the amount allowed if the creditor surrenders his security. Second, if the creditor exhausts its security before receiving payment upon the amount owing, it may receive its credit less the fair value of the security. Finally, if the creditor does not have the right to exhaust its security, or has not done so, it may receive the amount of the claim allowed less the value of the security. Minn.Stat. § 524.3-809 provides options for the secured creditor, but does not interfere with the process set out in Minn.Stat. § 524.3-806. The Minnesota Supreme Court has addressed this question. In *Browning v. Eiken*, 189 Minn. 375, 249 N.W. 573 (1933), the court reviewed allowance of an intermediate account, where the probate

> court approved the act of a bank in applying a part of a deposit account in payment of notes held by it against decedent. The court stated:
>
> "The general rule is that a creditor holding securities has the option, after the debtor's death, to enforce his securities for payment of his claim or to file his claim as a general creditor of the estate." [*Larson*, 359 NW2d at 285-286, quoting *Browning*, 189 Minn at 380.][11]

The *Larson* court concluded that the bank had proceeded lawfully under the probate code. *Larson*, 359 NW2nd at 286; see also *Binder v Fruth*, 150 Ariz 21, 24; 721 P2d 679 (Ariz App, 1986) (considering provisions of the Arizona probate code modeled after the Uniform Probate Code and agreeing with the reasoning of the *Larson* court quoted here); 34 CJS, Executors and Administrators, § 555 ("A secured creditor generally need not present his or her claim for allowance to preserve a right to enforce the security, but presentation is generally required where recovery is sought out of the general assets of the estate.").

In *In re Stephenson Estate*, 217 Ariz 284; 173 P3d 448 (Ariz App, 2007), the Arizona Court of Appeals considered whether a secured creditor must seek permission from the court or from the personal representative before conducting a trustee's sale of property secured by a deed of trust. The court noted several ways in which the Arizona probate code treats secured creditors differently than other claimants. *Id*. at 286-287 (discussing the Arizona statute similar to MCL 700.3104, MCL 700.3803, MCL 700.3812, and MCL 700.3809). It rejected the argument "that the sale of encumbered estate property is subject to court supervision, and

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[11] The provisions of the Minnesota probate code cited are similar to MCL 700.3814 (encumbered assets), MCL 700.3809 (secured claims), MCL 700.3806 (allowance and disallowance of claims), respectively.

[that] the proceeds of the sale must be distributed pursuant to the priorities specified in" the Arizona analogue of MCL 700.3805. *Stephenson*, 217 Ariz at 288-289. It noted the secured creditor's right under *Binder* to choose its remedy. *Id*. at 288. After noting that the appellee (representing the estate) had cited no "authority to support its position that the proceeds of the trustee's sale can be distributed to pay for other expenses of the decedent debtor to the detriment of the secured creditor," the court rejected the appellee's argument that Ariz Rev Stat 14-3805 (analogous to MCL 700.3805) protects the rights of secured creditors. *Id*. First, the court noted that Ariz Rev Stat 14-3805 does not distinguish between secured claims and other debts and does not even mention secured creditors. Second, it explained that Ariz Rev Stat 14-3805 "governs the priority of 'claims,' " but "[a] secured creditor can enforce its security and need not file a claim." *Id*., citing the Arizona statute comparable to MCL 700.3803. The *Stephenson* court concluded that Ariz Rev Stat 14-3805 "has no applicability to a secured creditor that chooses to execute on its security rather than file a claim." *Id*.

Both *Larson* and *Stephenson*, which interpreted the rights and remedies of secured creditors under statutory schemes very similar to EPIC, lend support to our conclusion that the bank was entitled to exhaust the funds in the CD account.

Finally, there is a dispute between the parties over whether the deposit account ever became estate property.[12] We need not determine whether the CD account was ever technically estate property because the bank

[12] Under EPIC, " '[p]roperty' means anything that may be the subject of ownership, and includes both real and personal property or an interest in real or personal property." MCL 700.1106(u). At the relevant time, MCL 700.1104(b) provided that

was entitled to exhaust the funds in the account without making a claim on the estate.

Reversed and remanded. Jurisdiction is not retained.

"[e]state" includes the property of the decedent, trust, or other person whose affairs are subject to this act as the property is originally constituted and as it exists throughout administration. Estate also includes the rights described in [MCL 700.3805, 700.3922, and 700.7502] to collect from others the amounts necessary to pay claims, allowances, and taxes.

PEOPLE v FONVILLE

Docket No. 294554. Submitted October 6, 2010, at Detroit. Decided January 25, 2011, at 9:00 a.m.

Derek Fonville pleaded guilty in the Oakland Circuit Court to one count of child enticement, MCL 750.350, as part of a plea agreement whereby the prosecution agreed to drop a second child enticement charge. The plea bargain included a *Cobbs* agreement, *People v Cobbs*, 443 Mich 276 (1993), that the trial court would impose a sentence at the low end of the sentencing guidelines recommended minimum sentence range. The court, Denise Langford Morris, J., accepted the plea. At a subsequent sentencing hearing, defendant asked to withdraw his plea, asserting his innocence and that he would not have pleaded guilty had he known that his conviction would require him to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The court granted defense counsel's motion to withdraw as counsel and defendant, represented by new counsel, again moved to withdraw his plea. The court denied the motion to withdraw the plea, holding that the plea was valid, that defendant had entered into a *Cobbs* agreement, that the prosecution was the sole charging authority, that nothing indicated that defendant was innocent, and that defendant admitted the facts that supported his plea. The court determined that the plea was knowing, voluntary, and accurate and sentenced defendant to 51 months to 20 years in prison. The court then denied defendant's motion to withdraw his plea after sentencing. The Court of Appeals denied defendant's delayed application for leave to appeal in an unpublished order, entered October 31, 2007 (Docket No. 280968). The Supreme Court then denied leave to appeal. 480 Mich 1136 (2008). Defendant moved in the trial court for relief from the judgment, and the trial court denied that motion and a subsequent motion for reconsideration. The Court of Appeals granted defendant's application for leave to appeal.

The Court of Appeals *held*:

1. An inculpatory inference could be drawn from defendant's admission that, although he originally had permission from his friend to take her two children with him, he later fraudulently

detained them by driving around and using drugs until the next afternoon while the children were in his car instead of returning them at the agreed-upon time. Defendant's admissions fit the elements of child enticement. The trial court did not abuse its discretion by denying defendant's motion to withdraw his plea. Defendant did not demonstrate, as required by MCR 6.310(B), that the withdrawal of his plea would be in the interest of justice. Moreover, defendant did not argue that he was actually innocent of the alleged conduct. He voluntarily pleaded guilty pursuant to a valid plea agreement.

2. Although the offense of child enticement includes no express sexual component as a requirement for a conviction, the Legislature deemed registration under SORA for those convicted of child enticement a necessary measure to protect the safety and welfare of the children of this state. Requiring registration as a sex offender following a conviction for a listed offense is not punishment. Registration is not a punitive measure intended to chastise, deter, or discipline an offender, but it is merely a remedial regulatory scheme furthering a legitimate state interest.

3. Defense counsel's failure to move to quash the information was not ineffective assistance of counsel because sufficient evidence was presented at the preliminary examination to support the bindover.

4. For purposes of determining whether defense counsel provided effective assistance in the context of a guilty plea, a defendant need only be made aware by defense counsel of the direct consequences of a guilty plea. The defendant's ignorance of the collateral consequences of the plea does not render the plea involuntary. Counsel's failure to properly advise of the collateral consequences of a plea deal does not bear on whether the defendant properly understood the decision to plead guilty to the charges.

5. Because of its close connection to the criminal process, sex offender registration as a consequence of a criminal conviction is difficult to classify as either a direct or a collateral consequence. Therefore, the collateral versus direct distinction is ill-suited to evaluate an ineffective-assistance-of-counsel claim concerning sex offender registration. The automatic result of sex offender registration for certain defendants makes it difficult to divorce the penalty from the conviction. Defense counsel's duty to give correct advice regarding the registration requirement is clear when, as here, the sex-offender-registration statute is succinct, clear, and explicit in defining the registration requirement.

6. Defense counsel must advise a defendant that registration as a sexual offender is a consequence of a guilty plea to a listed

offense. The failure to inform the defendant affects whether the plea was knowingly made. Defendant in this case showed serious derelictions on the part of his counsel sufficient to show that his plea was not a knowing and intelligent act.

7. Defense counsel's failure to advise defendant that his plea would require him to register as a sex offender prejudiced defendant to the extent that, but for counsel's error, the result of the proceeding would have been different. Although the registration requirement does not constitute cruel and unusual punishment in the context of the charge against defendant, given the lack of a sexual component to defendant's conduct, it was imperative that his counsel advise him of the unique registration consequences of his plea.

Reversed and remanded for further proceedings.

JANSEN, J., concurring in part and dissenting in part, agreed that defense counsel rendered ineffective assistance of counsel by failing to inform defendant that his plea would require him to register as a sex offender. Judge JANSEN dissented from the determination that there was a sufficient factual basis to support defendant's guilty plea. There was no evidence that defendant acted with the requisite specific intent to detain or conceal the children from their mother. Because there was an insufficient factual basis for the plea, the trial court erred by accepting the plea. The matter should be remanded to the trial court with instructions to permit defendant to withdraw his plea.

1. CRIMINAL LAW — GUILTY PLEAS — FACTUAL BASIS FOR GUILTY PLEAS — INCULPATORY INFERENCES — EXCULPATORY INFERENCES.

When reviewing whether the factual basis for a defendant's guilty plea was adequate, the Court of Appeals considers whether the fact-finder could have found the defendant guilty on the basis of the facts elicited from the defendant at the plea proceeding; a factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant admitted, even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference; even if the defendant denies an element of the crime, the trial court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant admitted.

2. CRIMINAL LAW — GUILTY PLEAS — MOTIONS TO WITHDRAW GUILTY PLEAS — FAIR AND JUST REASONS TO WITHDRAW PLEAS.

A court should grant a motion to withdraw a guilty plea before sentencing only if the defendant shows that withdrawal of the plea

is in the interest of justice, which requires the defendant to articulate a fair and just reason for withdrawing the plea; fair and just reasons include claims of actual innocence or a valid defense to the charge, not dissatisfaction with the sentence or incorrect advice from defense counsel (MCR 6.310[B]).

3. CRIMINAL LAW — CHILD ENTICEMENT — SEX OFFENDERS REGISTRATION ACT — REGISTRATION OF PERSONS CONVICTED OF CHILD ENTICEMENT.

The offense of child enticement involves the leading, taking, carrying away, decoying, or enticing away of a child under 14 yeas of age with the intent to detain or conceal the child from the child's parent; although the offense includes no express sexual component as a requirement for a conviction of the offense, the Legislature has deemed registration under the Sex Offenders Registration Act for those convicted of that offense a necessary measure to protect the safety and welfare of children in the state; requiring persons convicted of offenses listed in the Sex Offenders Registration Act to register is not punishment or a punitive measure intended to chastise, deter, or discipline an offender, but it is merely a remedial regulatory scheme furthering a legitimate state interest and does not constitute cruel or unusual punishment, (MCL 28.721a, 28.722[e][*vii*], 28.723, 750.350).

4. CRIMINAL LAW — EFFECTIVE ASSISTANCE OF COUNSEL — BURDEN OF PROOF.

A defendant asserting a claim of ineffective assistance of counsel must show that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that defense counsel's deficient performance so prejudiced the defendant that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different; in this process, the defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy.

5. CRIMINAL LAW — ATTORNEY AND CLIENT — GUILTY PLEAS — CONSEQUENCES OF PLEAS — EFFECTIVE ASSISTANCE OF COUNSEL.

A defendant need only be made aware of the direct consequences of a guilty plea in order for the defendant's counsel to provide effective assistance; a defendant's ignorance of the collateral consequences of a plea does not render the plea involuntary, and counsel's failure to properly advise regarding the collateral consequences of a plea does not bear on whether the defendant properly understood the decision to enter the plea.

6. CRIMINAL LAW — ATTORNEY AND CLIENT — GUILTY PLEAS — SEX OFFENDERS REGISTRATION ACT — EFFECTIVE ASSISTANCE OF COUNSEL.

To provide effective assistance of counsel, defense counsel must advise a defendant contemplating a plea of guilty with regard to an offense listed in the Sex Offenders Registration Act that as a consequence of the guilty plea, the defendant will be required to register under the act; a failure to provide that information affects whether the plea was knowingly made (MCL 28.721 *et seq*.).

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *John S. Pallas*, Chief, Appellate Division, and *Janice A. Kabodian*, Assistant Prosecuting Attorney, for the people.

Terence R. Flanagan for defendant.

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

WHITBECK, J. Defendant, Derek Fonville, appeals by leave granted the trial court's order denying his motion for relief from judgment. Fonville pleaded guilty to a count of child enticement[1] as part of a plea bargain. We reverse and remand the matter to the trial court.

I. BASIC FACTS

The circumstances from which this action arises involve the two children of Fonville's girlfriend: JR 1 (aged 10) and JR 2 (aged 8). On the evening of April 19, 2006, the children's mother voluntarily placed them in Fonville's care while she was at work. However, Fonville failed to return the children at the agreed-upon time; instead, he kept them through the night and well into the next day. The police recovered the children during the afternoon of April 20, 2006. The children were tired,

[1] MCL 750.350.

but unharmed. The prosecution accused Fonville of detaining the children in his vehicle while he and a friend were driving around under the influence of alcohol and drugs.

The prosecution originally charged Fonville with two counts of child enticement and two counts of kidnapping.[2] Following the preliminary examination, the district court bound Fonville over on the original counts, holding as follows:

> While it was clear that [Fonville] did have consent to have the children when he first took them on April 19th, his job at that point in time, for lack of a better word, was to keep an eye on the kids while [their mother] went to work and that he would pick her up later. And the understanding was that the kids would be returned to her at that point in time. While he had consent the fact of the matter is he did not have consent to keep the kids overnight. He even admitted the same to Detective [Lawrence] Fetherolf that he did keep the kids overnight; took them on a number of different journeys out to Pontiac it sounds like. And did not return the children home at any point during the night of the 19th or the morning of the 20th even when [JR 1] . . . requested that he be allowed to go home. He was told "no" at that point in time. The testimony of Detective Fetherolf was that [Fonville] felt it more important to take care of [his friend] . . . than to return the children to their mother at that point in time. So, I think the best you've got is a question of fact. The matter will be bound over to circuit court on all charges and bond will be continued.

In an amended information, the prosecution dropped the two kidnapping charges and kept only the two counts of child enticement. Pursuant to an agreement with the prosecution, Fonville agreed to enter a guilty plea to one count of child enticement in exchange for the prosecution's dropping the other count of child

[2] MCL 750.349.

enticement. Fonville's plea bargain included a *Cobbs*[3] agreement, which was that the trial court would sentence him at the low end of the sentencing guidelines recommended minimum sentence range.

At a September 2006 plea proceeding, defense counsel stated that he had explained the plea bargain to Fonville and Fonville's mother. Fonville agreed on the record that it was his understanding that he would enter the *Cobbs* plea with a minimum-sentence cap of 51 months and that he would be able to withdraw his plea if the minimum sentence went beyond that. The trial court then went on to accept Fonville's guilty plea. During the trial court's questioning, Fonville stated that, on April 20, 2006, he "pretty much endangered two young kids" by "doing drugs and driving around with them in the car." Fonville acknowledged that the children were less than 14 years old. He admitted that he and a friend were using cocaine at the time the children were with him. Fonville also agreed with the prosecution that he and his friend repeatedly drove to Pontiac to get crack cocaine and that the children were with them. He agreed that his addiction to crack cocaine was "feeding" his mind. Fonville acknowledged that he knew that he was supposed to return the children to their home at 11:00 p.m. on April 19. He agreed that "because of getting crack and everything," he "ended up . . . keeping the kids with [him], driving around from 11 p.m. at night through 2 p.m. in the afternoon the next day[.]" The prosecution asked him, "So you fraudulently detained these kids, correct?";

[3] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993) (indicating that a *Cobbs* agreement is one in which a defendant agrees to plead guilty or no contest in reliance on the trial court's preliminary evaluation of the sentence; however, the defendant is allowed to withdraw the plea in the event that the trial court determines that it must exceed the preliminary evaluation).

Fonville answered, "Yes." The prosecution and the defense indicated their satisfaction with the factual basis for Fonville's plea to the charge of child enticement. And the trial court stated that it was satisfied that Fonville's plea was knowingly, voluntarily, and accurately made.

However, at the September 2006 sentencing hearing, defense counsel informed the trial court that Fonville wished to withdraw his plea. Defense counsel explained that Fonville wished to withdraw his plea because the plea agreement would encompass the requirement that he register as a sex offender. Fonville then addressed the trial court and stated that he wanted a jury trial. Fonville asserted that his defense counsel had told him that he would be making a "big mistake going to trial." He further explained:

> When I came into the court on the 13th of September, I sat in the holding cell all day and never came to court cause my lawyer set a court date with the prosecutor indicating to him that I would take a [*Cobbs*] plea, when I did not. That's why I never came into court that day, because I was supposed to notify my lawyer and if I wanted to plead to get hold of him, and I never agreed to it. So, naturally, I didn't come to court.
>
> So then I came back into court on the 15th of September, that following Friday, and that's when my lawyer kept telling me to taking [sic] a *Cobbs* plea, four years to ten. I told him numerous times I wanted a jury. That's when he said a second time I was making a mistake.
>
> So, when I came into court the 15th of September my lawyer came in a third time and said to my mom, you should take the plea. While the prosecutor was talking to my mom, I looked at my mom and she said "take it". So, I did, thinking she was looking out for my best interest, even though I didn't do this. When I talked to my mom later that evening she said the prosecutor said he knew I didn't

> kidnap those kids and he said to my mom if I went to trial that he would have to play hardball.

Fonville denied the enticement charge, stating: "I would never lure a kid or kidnap anyone. It's a hard pill to swallow especially when I would never force [JR 2] or [JR 1] to do something they didn't want to do. I love kids and always try to help if I can." The trial court indicated that it needed to review the plea transcript, so it adjourned sentencing.

Before the trial court could reconvene for sentencing, Fonville's attorney moved to withdraw as counsel for Fonville, which the trial court granted. And in January 2007, Fonville, represented by new counsel, again moved to withdraw his plea. Although admitting child endangerment, Fonville asserted in his motion that he should be allowed to withdraw his plea because he had no "evil, criminal intent," merely "reckless criminal intent." The prosecution responded, asserting that Fonville's admission that he fraudulently detained the children supported the plea.

At a February 2007 hearing on the motion, defense counsel asserted that Fonville had entered his plea on the basis of inaccurate and misleading advice of his former counsel and that he was innocent of the charge of child enticement. Defense counsel asserted that when Fonville was told that he could plead guilty of child enticement instead of kidnapping, he did not understand that both kidnapping and child enticement carried potential life sentences. Defense counsel contended that the facts did not support a conviction of child enticement, noting that the children were unharmed. Defense counsel argued that the factual basis for the plea only supported a conviction of second-degree child abuse, to which Fonville was willing to plead guilty.

The prosecution responded, noting that the transcript of the plea proceedings clearly showed that Fonville acknowledged that he understood that the maximum sentence for child enticement is life in prison. The prosecution further argued that the facts as pleaded showed that Fonville had committed the offense of child enticement. The prosecution pointed out that Fonville did not claim innocence: he admitted that he fraudulently detained the children by concealing their whereabouts from their mother while he was driving around looking for cocaine. Thus, the prosecution contended that Fonville had not demonstrated that the requested plea withdrawal would be in the interest of justice. The prosecution additionally argued that permitting Fonville to withdraw his plea would result in substantial prejudice. In support of this position, the prosecution noted that if the case went to trial, the children would have to testify. According to the prosecution, this would be extremely difficult for them because they would have to be psychologically prepared to do so.

Considering Fonville's motion, the trial court held that (1) Fonville's plea was valid, (2) Fonville entered into a *Cobbs* agreement, (3) the prosecutor was the sole charging authority, (4) nothing indicated that Fonville was innocent, and (5) Fonville admitted the facts supporting his plea. The trial court ultimately reasoned:

> . . . I understand that those are the types of allegations that, quite frankly, could be made in a lot of cases and not constituting child enticement, but the requirement to go forward with a child enticement charge, again, is not within the province of the Court finding that that would outweigh the benefits of the finality and all the other issues associated and have been set forth by the People.
>
> The Court also notes that the Court gave [Fonville] a *Cobbs* impression [sic] which was to the, basically, the bottom of the guidelines and so given the totality of

> circumstances and for the reasons as set forth by the People, [Fonville's] motion to withdraw his plea is denied.

At the subsequent sentencing hearing, defense counsel acknowledged the *Cobbs* agreement for the trial court not to exceed the guidelines minimum of 51 months, but he attempted to persuade the trial court to deviate below that minimum. Defense counsel noted Fonville's history with the children, the fact that the children were not harmed, and the fact that the children's mother had submitted a letter stating that he did not deserve jail time.

To the extent that Fonville was seeking again to withdraw his plea, the trial court reiterated that Fonville's plea was knowing, voluntary, and accurate. It found no basis for permitting the withdrawal. The trial court then provided Fonville with his opportunity for allocution, and Fonville told the trial court:

> On April 20th, 2006 I had possession of my girlfriend's two young children, [JR 1], age ten, and [JR 2], age eight.
>
> I was supposed to return the two children to the mother at 11 p.m. . . . I did not do so. Instead I retained possession of the children until I was apprehended by the police at 12:15 p.m., in the afternoon of April 21st, 2006.
>
> I admitted that I did not return on time and I kept the children in the car with me while I drove around Oakland County looking for cocaine continuously from 11 p.m. until apprehended by police the next day at 12:15 p.m. on April 21st, 2006.
>
> However, there's one important fact, which is, that approximately one hour before being apprehended Waterford Police investigated my vehicle, questioned . . . me [and] a passenger . . . , and the two children, who were playing basketball, and all were released to go on our way . . . .

* * *

> . . . I plead [sic] guilty . . . . At . . . the date of sentence, I read a letter to the Court detailing why I wanted to withdraw my plea. I essentially stated that I did not receive accurate advice and claimed my innocence to kidnapping. In addition, I never realized that I would go down as a sexual offender.
>
> I always thought I was guilty of some sort of child endangerment charge because of my actions, not an enticement charge, which denotes some kind of evil criminal intent as oppose [sic] to reckless intent. . . .
>
> * * *
>
> . . . I would like to say that with child enticement on my record makes me a sexual predator.
>
> I will never make the money I'm used to making and my career will be over.
>
> I had permission to have these children, which I've had permission before. So how can I be charged with child enticement . . . .
>
> * * *
>
> I did put them [sic] children in a bad situation and I am sorry that my addiction took over. I was drinking along with taking xanax, which literally made me blackout. That's the real reason I'm in this situation. The fact of the matter is, yes, I should be punished, but enticement is not even chose [sic] to child abuse.

Again, to the extent that Fonville sought to withdraw his plea, the trial court denied the request. The trial court then sentenced Fonville to a term of 51 months to 20 years in prison.

Fonville moved to withdraw his plea after sentencing, arguing again that the facts did not support the charge of child enticement. But the trial court denied the motion, finding that Fonville had failed to present any new issues.

Fonville filed a delayed application for leave to appeal, challenging the constitutionality of the child-enticement statute, the prosecution's choice to charge him with child enticement, and the denial of his motion to withdraw his plea on the basis of ineffective assistance of counsel, coercion, and prosecutorial misconduct. This Court denied the application for lack of merit.[4] The Michigan Supreme Court also denied his application for leave to appeal.[5]

Fonville then moved in the trial court for relief from judgment, raising the same issues that he now brings on appeal. The trial court held that Fonville had not demonstrated good cause for having failed to raise these issues in his earlier application for leave to appeal and that he had failed to show actual prejudice. The trial court concluded that defense counsel's failure to inform Fonville of the collateral consequences of the plea, namely inclusion on the sex offender registry, did not constitute ineffective assistance of counsel. The trial court further found "no irregularity so offensive to the maintenance of a sound judicial process that [Fonville's] conviction should not be allowed to stand." Accordingly, the trial court denied Fonville's motion. Fonville moved for reconsideration, but the trial court denied the motion.

Fonville now appeals by leave granted.

II. CLAIMS ON APPEAL

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial

[4] *People v Fonville*, unpublished order of the Court of Appeals, entered October 31, 2007 (Docket No. 280968).

[5] *People v Fonville*, 480 Mich 1136 (2008), reconsideration den 481 Mich 881 (2008).

court's denial of a defendant's motion for relief from judgment.[6] This Court also reviews for an abuse of discretion a trial court's denial of a defendant's motion to withdraw a plea.[7] An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.[8] Moreover, this Court reviews de novo constitutional issues.[9]

B. LEGAL STANDARDS

According to MCR 6.508(D), a defendant seeking relief from judgment has the burden of establishing entitlement to such relief. MCR 6.508(D)(3) also states that a court may not grant that relief if, among other things, the motion

> alleges grounds for relief . . . which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates:
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
>
> * * *
>
> (ii) in a conviction entered on a plea of guilty, . . . the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction

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[6] *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001).

[7] *People v Billings*, 283 Mich App 538, 549; 770 NW2d 893 (2009).

[8] *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

[9] *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003).

> should not be allowed to stand regardless of its effect on the outcome of the case[.]
>
> * * *
>
> The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

C. WITHDRAWAL OF PLEA

Fonville argues that he should be allowed to withdraw his plea to the charge of child enticement because he has consistently maintained his innocence of the crime, the plea was entered on the basis of an incorrect charge, and there was an insufficient factual basis to support a conviction.

When reviewing whether the factual basis for a plea was adequate, this Court considers whether the fact-finder could have found the defendant guilty on the basis of the facts elicited from the defendant at the plea proceeding.[10]

> "A factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted. This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference. Even if the defendant denies an element of the crime, the court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says."[11]

Additionally, MCR 6.310(B) provides, in pertinent part, that a motion to withdraw a plea before sentencing should only be granted if the defendant is able to show

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[10] *People v Adkins*, 272 Mich App 37, 38; 724 NW2d 710 (2006).

[11] *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993), quoting *People v Jones*, 190 Mich App 509, 511-512; 476 NW2d 646 (1991) (citations omitted).

that withdrawal of the plea is "in the interest of justice," meaning that the defendant has to articulate "a fair and just reason" for withdrawing the plea.[12] Fair and just reasons include reasons like a claim of actual innocence or a valid defense to the charge.[13] Things that are not considered fair and just reasons are dissatisfaction with the sentence or incorrect advice from the defendant's attorney.[14]

Fonville pleaded guilty of child enticement. MCL 750.350(1) defines that crime as follows:

> A person shall not maliciously, forcibly, or fraudulently lead, take, carry away, decoy, or entice away, any child under the age of 14 years, with the intent to detain or conceal the child from the child's parent or legal guardian, or from the person or persons who have adopted the child, or from any other person having the lawful charge of the child.

At the plea proceeding, Fonville testified that he "pretty much endangered two young kids[.]" He did this by "doing drugs and driving around with them in the car." He admitted that he and his friend were driving around with the children while getting crack cocaine. He admitted that he knew that he was supposed to return the children to their mother at 11:00 p.m. and that he had told both the children and their mother that this was what he was going to do. "But [he] ended up because of getting crack and everything keeping the kids with [him], driving around from 11 p.m. at night through 2 p.m. in the afternoon the next day . . . ." Fonville agreed that he had "fraudulently detained" the children.

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[12] *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000) (quotation marks and citation omitted).

[13] *Id.* at 596.

[14] *Id.* at 596-597; *People v Haynes (After Remand)*, 221 Mich App 551, 559; 562 NW2d 241 (1997).

Given that Fonville's admissions were in line with the elements of the charged crime, we conclude that the trial court did not abuse its discretion by denying his motion to withdraw his plea. An inculpatory inference can be drawn from what Fonville admitted. That is, although he originally might have had consent to take the children, he admitted that he later fraudulently detained them by driving around and doing drugs until the next afternoon while the children were in the car instead of returning them at 11:00 p.m. as agreed upon with their mother.

Fonville did not sufficiently demonstrate that withdrawal of his plea was in the interest of justice. Moreover, although Fonville claimed that he was innocent of the crime as charged because he did not have an "evil intent," he never argued that he was actually innocent of the alleged conduct. The prosecution has authority to choose appropriate charges,[15] and Fonville voluntarily pleaded guilty to the charge pursuant to a valid plea agreement placed on the record.

D. CRUEL AND UNUSUAL PUNISHMENT

Fonville argues that the requirement that he register as a sex offender when there was absolutely no sexual component to the offense committed amounts to cruel and unusual punishment under the Michigan Constitution. He contends that, at minimum, he should be entitled to an order removing his name from the sex offender registry.

The Sex Offenders Registration Act (SORA)[16] requires persons convicted of certain listed offenses to register as sex offenders.[17] The listed offenses include

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[15] *People v Williams*, 186 Mich App 606, 609-610; 465 NW2d 376 (1990).

[16] MCL 28.721 *et seq*.

[17] MCL 28.723.

child enticement.[18] Child enticement involves the leading, taking, carrying away, decoying, or enticing away of a child under 14 years of age with the intent to detain or conceal the child from the child's parent. Thus, Fonville is correct that the offense of child enticement includes no express sexual component as a requirement for a conviction of the offense.

However, the Legislature has made clear that the intended purpose of SORA is to protect public safety and monitor those persons who pose a potential danger to children:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. *The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state.* The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.[19]

Thus, although the offense of child enticement includes no express sexual component as a requirement for a conviction of the offense, the Legislature has nevertheless deemed registration for those convicted of that crime to be a necessary measure to protect the safety and welfare of the children of this state. And in this case, Fonville admitted that his conduct, while not sexual in nature, "endangered two young kids[.]"

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[18] MCL 28.722(e)(*vii*); MCL 750.350.

[19] MCL 28.721a (emphasis added).

Moreover, requiring that a defendant comply with the statutory mandate that the defendant register as a sex offender following a conviction of a listed offense is not punishment. Although a defendant may see registration as a penalty for a conviction of a listed offense, it is not actually a punitive measure " 'intended to chastise, deter or discipline an offender.' "[20] It is merely a "remedial regulatory scheme furthering a legitimate state interest."[21]

To the extent that Fonville argues that we should follow *People v Dipiazza*,[22] we disagree because that case is factually distinguishable. In *Dipiazza*, this Court held that requiring the defendant in that case to register as a sex offender was cruel or unusual punishment.[23] However, in that case, after the defendant completed probation, his case was dismissed under the terms of the Holmes Youthful Trainee Act,[24] leaving him with no conviction on his record.[25] Despite the dismissal of his case, because he was assigned to youthful-trainee status on August 29, 2004, he continued to remain required to register as a sex offender, whereas after amendments of SORA, a defendant assigned to youthful-trainee status after October 1, 2004, was not required to register (unless the defendant's status of youthful trainee was revoked and an adjudication of guilt was entered).[26] This Court concluded that, under those circumstances, requiring the defendant to register as a sex offender

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[20] *People v Golba*, 273 Mich App 603, 617; 729 NW2d 916 (2007), quoting *Doe v Kelley*, 961 F Supp 1105, 1108 (WD Mich, 1997).

[21] *Golba*, 273 Mich App at 617.

[22] *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009).

[23] *Id.* at 156.

[24] MCL 762.11 *et seq*.

[25] *Dipiazza*, 286 Mich App at 140.

[26] *Id.* at 140, 143.

was cruel or unusual punishment.[27]

Conversely, there has been no similar amendment of the statutory scheme under which Fonville pleaded guilty and his case has not been dismissed. Therefore, we disagree that the reasoning in *Dipiazza* applies in this case.

E. EFFECTIVE ASSISTANCE OF COUNSEL

Fonville argues that he did not receive effective assistance of counsel because his defense counsel failed to move to quash the information, which he alleges overcharged him. Fonville also argues that he did not receive effective assistance of counsel because his defense counsel failed to advise him that his conviction of child enticement would require that he register as a sex offender. While we disagree with his first contention, we find merit in the second.

In asserting a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that defense counsel's deficient performance so prejudiced the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[28] In proving these elements, the defendant must overcome a strong presumption that defense counsel's performance constituted sound trial strategy.[29] Absent an evidentiary

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[27] *Id.* at 156.

[28] *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[29] *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

hearing, this Court's review of counsel's performance is limited to mistakes apparent on the record.[30]

1. FAILURE TO MOVE TO QUASH THE INFORMATION

To the extent that Fonville argues that he did not receive effective assistance of counsel because his defense counsel failed to move to quash the information, Fonville has not properly presented this argument to this Court because he failed to identify it as an issue in his statement of questions presented.[31] Therefore, he has waived this issue for appellate review.[32]

We note, however, that a motion to quash the information would have been futile. As stated, following the preliminary examination, the district court bound Fonville over on the original counts, including child enticement, holding as follows:

> While it was clear that [Fonville] did have consent to have the children when he first took them on April 19th, his job at that point in time, for lack of a better word, was to keep an eye on the kids while [their mother] went to work and that he would pick her up later. And the understanding was that the kids would be returned to her at that point in time. While he had consent the fact of the matter is he did not have consent to keep the kids overnight. He even admitted the same to Detective Fetherolf that he did keep the kids overnight; took them on a number of different journeys out to Pontiac it sounds like. And did not return the children home at any point during the night of the 19th or the morning of the 20th even when [JR 1] . . . requested that he be allowed to go home. He was told "no" at that point in time. The testimony of Detective Fetherolf was that [Fonville] felt it more important to take care of

[30] *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[31] MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

[32] *Caldwell*, 240 Mich App at 132.

> [his friend] . . . than to return the children to their mother at that point in time. So, I think the best you've got is a question of fact. The matter will be bound over to circuit court on all charges and bond will be continued.

Because sufficient evidence existed at the preliminary examination to support a bindover, defense counsel was not ineffective for failing to move to quash the information.[33] "[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile."[34] Here, the district court found that there was sufficient evidence to create a question of fact concerning whether Fonville committed the acts as charged. Therefore, Fonville's claim is without merit.

2. FAILURE TO ADVISE REGARDING SEX OFFENDER REGISTRATION REQUIREMENT

a. BASIC LEGAL PRINCIPLES

"[W]hen a defendant argues ineffective assistance of counsel in the context of a guilty plea, the defendant is essentially arguing that counsel failed to provide sufficient information regarding the consequences, elements, or possible defenses of the plea."[35] And " '[t]o establish ineffective assistance of counsel in the context of a guilty plea, courts must determine whether the defendant tendered a plea voluntarily and understandingly.' "[36] "Absent sufficient information, the plea would be unknowing and, consequently, involuntary."[37] "Defense counsel's advice does not need to be correct, but it

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[33] *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

[34] *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

[35] *People v Davidovich*, 238 Mich App 422, 427; 606 NW2d 387 (1999).

[36] *Id*. at 425, quoting *People v Corteway*, 212 Mich App 442, 445; 538 NW2d 60 (1995).

[37] *Davidovich*, 238 Mich App at 427.

must fall within the range of competence demanded of attorneys in criminal cases."[38] More specifically,

> for purposes of determining whether defense counsel was effective[,] a defendant need only be made aware of the *direct* consequences of a guilty plea. A defendant's ignorance of the *collateral* consequences of a plea does not render the plea involuntary. Counsel's failure to properly advise of collateral consequences of a plea does not bear on whether a defendant properly understood the decision to plead guilty to the charges in question.[39]

Examples of collateral or incidental consequences include the loss of employment, loss of the right to vote, loss of the right to travel freely abroad, loss of the right to a driver's license, loss of the right to possess firearms, a plea's possible enhancing effects on a subsequent sentence, institution of separate civil proceedings against the defendant for commitment to a mental-health facility, loss of good-time credit, possibility of imposition of consecutive sentences, possibility of undesirable discharge from the armed forces,[40] disqualification from public benefits, and loss of business or professional licenses.[41]

In contrast, this Court indicated in *People v Boatman* that an example of a direct consequence of a plea would be the consequence resulting from being sentenced as an habitual offender.[42] In *Boatman*, although concluding that it lacked the authority to expand the scope of

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[38] *Id.* at 425.

[39] *Id.* at 428 (emphasis added); see also *People v Haynes*, 256 Mich App 341, 349; 664 NW2d 225 (2003) ("[C]riminal defendants may not withdraw a guilty plea on the ground that they were unaware of the future collateral or incidental effects of the initial valid plea.").

[40] *Davidovich*, 238 Mich App at 429.

[41] *Padilla v Kentucky*, 559 US ___, ___; 130 S Ct 1473, 1487; 176 L Ed 2d 284, 300 (2010) (Alito, J., concurring).

[42] *People v Boatman*, 273 Mich App 405, 409; 730 NW2d 251 (2006).

the language of MCR 6.302(B)(2)[43] to require that a trial court inform a defendant of the effect of the habitual-offender statute on the defendant's sentence, this Court nevertheless explained that "because of the existence of specific and separate guidelines applicable to the sentencing of habitual offenders, the effect of a defendant's habitual-offender status on sentencing does not comprise a 'collateral consequence.' "[44] This Court stressed that a defendant must know the most serious consequences of a guilty plea.[45] Therefore, according to this Court,

> [t]he existence of separate guidelines specified for use with habitual offenders demonstrates the necessity of informing a defendant of the use of these guidelines to ensure "understanding" of the consequences of a plea, particularly under the circumstances of this case where the difference in sentencing comprised a distinction between a misdemeanor and a felony, and a difference of 13 years in the sentence imposed.[46]

b. THE PARTIES' ARGUMENTS

The prosecution argues that sex offender registration is a collateral consequence of a conviction and, therefore, defense counsel's failure to inform Fonville of that requirement did not render his plea defective. In mak-

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[43] MCR 6.302(B) requires *only* that a trial court advise and determine that the defendant understands the following:

> (1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;
>
> (2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law[.]

[44] *Boatman*, 273 Mich App at 409.

[45] *Id.* at 412.

[46] *Id.*

ing this argument, the prosecution relies on an unpublished decision of this Court, *In re Lyons*.[47] In *Lyons*, a panel of this Court held that a trial court's failure to inform a defendant that he would be required to register as a sex offender did not provide a basis for overturning an otherwise valid plea.[48] Specifically, the *Lyons* panel stated that "[r]egistration as a sex offender is a collateral consequence of a conviction."[49] The prosecution acknowledges that sex offender registration is a serious consequence of a guilty plea. However, the prosecution observes that other recognized consequences, like loss of the right to vote, are also serious but, nevertheless, merely incidental consequences of the guilty plea. The prosecution also notes that in *Magyar v State*, the Mississippi Supreme Court recognized that "virtually every other jurisdiction to address the question" has held that "the requirement to register as a sex offender is a collateral consequence of a guilty plea[.]"[50] In those cases, the courts reasoned that sex offender registration is a collateral consequence of a guilty plea because the registration requirement is not penal in nature and thus not part of sentencing procedures.[51]

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[47] *In re Lyons*, unpublished memorandum opinion of the Court of Appeals, issued December 19, 2000 (Docket No. 217858).

[48] *Id.* at 1.

[49] *Id.*

[50] *Magyar v State*, 2007-CT-00740-SCT (¶ 11); 18 So 3d 807, 811-812 & n 5 (Miss, 2009) (citing cases from Alabama, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Missouri, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming).

[51] See, e.g., *Robinson v State*, 730 So 2d 252, 254 (Ala Crim App, 1998) ("Registration and community notification requirements for sex offenders do not constitute punishment."); *People v Montaine*, 7 P3d 1065, 1067 (Colo App, 1999) ("Although the duty to register flows directly from

Fonville, however, argues that this Court should hold that defense counsel was required to inform him that he must register as a sex offender because that requirement was *not* a future collateral or incidental effect of the initial valid plea.[52] Rather, Fonville contends that registration as a sex offender is an immediate and absolute effect of his conviction.[53] Fonville also contends that a reasonably competent attorney in the practice of criminal law would have been aware of the requirement to register as a sex offender. And he contends that if defense counsel had informed him of the requirement, he would not have pleaded guilty to the child-enticement charge.

c. DEFINING THE CONSEQUENCE

The salient determination comes down to whether registration as a sex offender is a direct or collateral consequence of a defendant's guilty plea.

We first note that we are not persuaded by the prosecution's reliance on *In re Lyons* or *Magyar*. *Lyons* is unpublished, offered no rationale for its conclusion, and is not binding on our decision in this case.[54] Additionally, the cases from other jurisdictions that the Mississippi Supreme Court cited in *Magyar* are also not

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defendant's conviction as a sex offender, it does not enhance defendant's punishment for the offense."); *State v Partlow*, 840 So 2d 1040, 1043 (Fla, 2003) ("A direct consequence must affect the range of punishment in a definite, immediate, and largely automatic way. The registration requirement has absolutely no effect on the 'range of the defendant's punishment' for the crime . . . .").

[52] See *Haynes*, 256 Mich App at 349.

[53] See MCL 28.723(1)(a) (requiring that any individual convicted of a listed offense after October 1, 1995, register under SORA, MCL 28.721 *et seq*.); MCL 28.722(e)(*vii*) (listing MCL 750.350 [child enticement] as a listed offense under SORA).

[54] See MCR 7.215(C)(1).

binding on this Court. And although we recognize the rationale in those cases as persuasive, we are more persuaded by the reasoning offered by the United States Supreme Court's recent decision in *Padilla v Kentucky*.[55] The parallels with this case, although not exact, are significant.

In *Padilla*, the Supreme Court considered the question whether defense counsel has an obligation to advise a defendant that the offense to which the defendant is pleading guilty will result in the defendant's deportation from this country. The defendant argued that his defense counsel's performance was deficient because counsel erroneously advised him that he did not "have to worry" about deportation as a consequence of his guilty plea.[56] In truth, the defendant's plea to the charged offense "made his deportation virtually mandatory."[57] The Court held that a defense attorney must inform a defendant whether a plea carries a risk of deportation.[58]

In so ruling, the Supreme Court agreed with the defendant that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation."[59] The Court reached this conclusion by first clarifying that although "deportation is a particularly severe 'penalty,' . . . it is not, in a strict sense, a criminal

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[55] *Padilla v Kentucky*, 559 US ___; 130 S Ct 1473; 176 L Ed 2d 284 (2010).

[56] *Id*. at ___; 130 S Ct at 1478 (quotation marks and citation omitted).

[57] *Id.* at ___; 130 S Ct at 1478.

[58] *Id.* at ___; 130 S Ct at 1478.

[59] *Id*. at ___; 130 S Ct at 1478. The Court left it to the lower court to determine on remand whether the defendant could satisfy the prejudice prong of the two-pronged ineffective-assistance analysis. *Id.* at ___; 130 S Ct at 1483-1484.

sanction."[60] However, the Court went on to explain that "[a]lthough removal proceedings are civil in nature, . . . deportation is nevertheless intimately related to the criminal process." [61] The Court determined that the "nearly . . . automatic result" of removal for noncitizen offenders made it difficult "to divorce the penalty from the conviction in the deportation context."[62] Therefore, according to the Court, "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence."[63] Accordingly, the Court concluded that "[t]he collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation."[64]

Turning to the merits of the defendant's ineffective-assistance claim, the Supreme Court noted that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[65] The Court added that its own

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[60] *Id*. at ___; 130 S Ct at 1481. We note that this point is in keeping with the prevailing conclusion that the statutory mandate that a defendant register as a sex offender is not punishment, but merely a "remedial regulatory scheme furthering a legitimate state interest." *Golba*, 273 Mich App at 617; see also, e.g., *Robinson*, 730 So 2d at 254 ("Registration and community notification requirements for sex offenders do not constitute punishment."); *Montaine*, 7 P3d at 1067 ("Although the duty to register flows directly from defendant's conviction as a sex offender, it does not enhance defendant's punishment for the offense."); *Partlow*, 840 So 2d at 1043 ("A direct consequence must affect the range of punishment in a definite, immediate, and largely automatic way. The registration requirement has absolutely no effect on the range of the defendant's punishment for the crime . . . .").

[61] *Padilla*, 559 US at ___; 130 S Ct at 1481.

[62] *Id*. at ___; 130 S Ct at 1481.

[63] *Id*. at ___; 130 S Ct at 1482.

[64] *Id*. at ___; 130 S Ct at 1482.

[65] *Id.* at ___; 130 S Ct at 1482.

precedent had also recognized the importance of deportation to a defendant's plea decision.[66] The Court then explained that when, as in *Padilla*, "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence" for the defendant's conviction, defense counsel's "duty to give correct advice is . . . clear."[67] The Court further noted, however, that even if the statute is not as clear, the "[l]ack of clarity in the law . . . does not obviate the need for counsel to say something about the possibility of deportation . . . ."[68]

We recognize a significant parallel to be drawn from the Supreme Court's rationale in *Padilla* to the circumstances of this case. Similar to the risk of deportation, sex offender registration "as a consequence of a criminal conviction is, because of its close connection to the criminal process, . . . difficult to classify as either a direct or a collateral consequence" and that therefore "[t]he collateral versus direct distinction is . . . ill-suited to evaluat[e] a *Strickland* claim" concerning the sex-offender-registration requirement.[69]

Like the consequence of deportation, sex offender registration is not a criminal sanction, but it is a particularly severe penalty.[70] In addition to the typical stigma that convicted criminals are subject to upon release from imprisonment, sexual offenders are subject to unique ramifications, including, for example, residency-reporting requirements[71] and place-of-domicile

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[66] *Id.* at ___; 130 S Ct at 1483, citing *Immigration & Naturalization Serv v St Cyr*, 533 US 289, 323; 121 S Ct 2271; 150 L Ed 2d 347 (2001).

[67] *Padilla*, 559 US at ___; 130 S Ct at 1483.

[68] *Id.* at ___n 10; 130 S Ct at 1483 n 10.

[69] *Id.* at ___; 130 S Ct at 1482.

[70] See *id.* at ___; 130 S Ct at 1481.

[71] MCL 28.724a; MCL 28.725; MCL 28.725a.

restrictions.[72] Moreover, sex offender registration is "intimately related to the criminal process."[73] The "automatic result" of sex offender registration for certain defendants makes it difficult "to divorce the penalty from the conviction . . . ."[74]

Further, when, as here, the sex-offender-registration statute is "succinct, clear, and explicit" in defining the registration requirement for the defendant's conviction, defense counsel's duty to give correct advice is likewise clear.[75] Thus, we conclude that applying the *Padilla* rationale to this case supports a holding that defense counsel must advise a defendant that registration as a sexual offender is a consequence of the defendant's guilty plea.[76] The failure to inform a pleading defendant that the plea will necessarily require registration as a sex offender affects whether the plea was knowingly made.

In reaching our conclusion in this case, we recognize that this Court held in *People v Davidovich* that the possibility that a defendant would be deported was a collateral, rather than a direct, consequence of his sentence.[77] However, that holding does not directly bear on this case because that case was limited to its facts. And although the *Padilla* holding directly contradicts the *Davidovich* ruling, this is not a deportation case. We rely on *Padilla* simply for the logic of its rationale, not

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[72] MCL 28.735.

[73] See *Padilla*, 559 US at ___; 130 S Ct at 1481.

[74] See *id*. at ___; 130 S Ct at 1481.

[75] See *id*. at ___; 130 S Ct at 1483.

[76] Accord *Taylor v State*, 304 Ga App 878, 882-883; 698 SE2d 384 (2010) (post-*Padilla* case, holding that the failure of trial counsel to advise his client that his guilty plea to a charge of child molestation would require that he comply with Georgia's sex-offender-registration requirement constituted deficient performance).

[77] *Davidovich*, 238 Mich App at 427-428 & n 4.

its ultimate disposition. We also recognize the *Davidovich* Court's concern that "[a]llowing defendants to withdraw their pleas once they discover that their conviction subjects them to deportation would open the door for defendants to withdraw their pleas for other collateral reasons."[78] However, while the *Padilla* decision has provided us with the key to open the door to allow defendants to withdraw their pleas for failure to be informed of the sex-offender-registration requirement, we do not see our decision as opening the floodgates to withdrawal-of-plea motions for other collateral reasons. Our decision is limited to distinguishing the unique and mandatory nature of the specific consequence of the sex-offender-registration requirement from the common, potential, and incidental consequences associated with criminal convictions.[79]

Additionally, we note that the prosecution argues that *Padilla* is not applicable to this case because the Supreme Court's decision in that case does not apply retroactively. However, as stated, we are not applying the *Padilla* decision to dictate the result in this case. Rather, we are simply borrowing the logic of its rationale. Moreover, we are mindful that concerns for finality caution that the validity of guilty pleas not be called into question when entered under the law applicable on the day the plea is taken.[80] However, the sex-offender-registration requirement was on the books at the time of Fonville's plea.[81] And more importantly, Fonville has shown "serious derelictions on the part of counsel

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[78] *Id.* at 428.

[79] See *Padilla*, 559 US at ___; 130 S Ct at 1482 (referring to the unique and specific risk of deportation).

[80] *People v Osaghae (On Reconsideration)*, 460 Mich 529, 534; 596 NW2d 911 (1999).

[81] See *id.* at 533.

sufficient to show that his plea was not, after all, a knowing and intelligent act."[82]

F. APPLICATION TO FONVILLE

The sex-offender-registration statute is "succinct, clear, and explicit" in defining the registration requirement for Fonville's conviction of child enticement. Therefore, to have satisfied his duty to act as constitutionally competent counsel, Fonville's defense attorney owed a duty to clearly advise Fonville that his plea to the charge of child enticement would require that he register as a sex offender.[83]

Moreover, we also conclude that defense counsel's failure to inform Fonville that his plea would require registration as a sex offender affected whether his plea was knowingly made. This failure, therefore, prejudiced Fonville to the extent that, but for counsel's error, the result of the proceeding would have been different. Fonville repeatedly informed the trial court that he would not have pleaded guilty of child enticement if he had known that he would also be required to register as a sex offender. And although the registration requirement does not constitute cruel and unusual punishment in the context of this charge, we do believe that, given the lack of any sexual component to Fonville's conduct, it was all the more imperative that his counsel advise him of the unique registration consequences of his plea.

III. CONCLUSION

In sum, we conclude that Fonville is not allowed to withdraw his plea to the charge of child enticement because there was a sufficient factual basis on the

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[82] *Id.* at 534 (quotation marks and citation omitted).

[83] See *Padilla*, 559 US at ___; 130 S Ct at 1483.

record to support his conviction. Likewise, we conclude that defense counsel was not ineffective for failing to move to quash the information. We also conclude that the requirement that defendant register as a sex offender does not amount to cruel and unusual punishment.

However, we conclude that defense counsel's performance was constitutionally defective when he failed to inform Fonville of the sex-offender-registration requirement. And we conclude that this failure prejudiced Fonville.

Accordingly, we reverse and remand for further proceedings. We do not retain jurisdiction.

FORT HOOD, P.J., concurred.

JANSEN, J. (*concurring in part and dissenting in part*). I fully concur with the majority's determination that defendant's attorney rendered ineffective assistance of counsel by failing to inform defendant that his guilty plea would require him to register as a sex offender. The majority correctly concludes that, like the consequence of deportation at issue in *Padilla v Kentucky*, 559 US ___; 130 S Ct 1473; 176 L Ed 2d 284 (2010), the requirement to register as a sex offender is a serious consequence of which a defense attorney must inform a client who wishes to plead guilty of certain offenses.

I respectfully dissent, however, from the majority's determination that there was a sufficient factual basis to support defendant's guilty plea in this case. Defendant pleaded guilty of enticing a child in violation of MCL 750.350(1), which provides:

> A person shall not maliciously, forcibly, or fraudulently lead, take, carry away, decoy, or entice away, any child under the age of 14 years, with the intent to detain or

> conceal the child from the child's parent or legal guardian, or from the person or persons who have adopted the child, or from any other person having the lawful charge of the child. A person who violates this section is guilty of a felony, punishable by imprisonment for life or any term of years.

As noted by the majority, defendant informed the circuit court during the plea proceeding that he "pretty much endangered two young kids" by "doing drugs and driving around with [the children] in the car." Defendant admitted that he was supposed to return the children to their mother at 11:00 p.m., but he "ended up because of getting crack and everything keeping the kids with [him], driving around from 11 p.m. at night through 2 p.m. in the afternoon the next day[.]" The circuit court determined that these statements provided a sufficient factual basis for defendant's guilty plea. I cannot agree.

Before accepting a defendant's plea of guilty, the circuit court must establish a factual basis for the plea. MCR 6.302(D)(1); *People v Carlisle*, 387 Mich 269, 273; 195 NW2d 851 (1972). A factual basis exists for a defendant's guilty plea if "the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding," *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996), or if "an inculpatory inference can reasonably be drawn by a jury from the facts admitted by the defendant even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference," *Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975).

I cannot conclude that the colloquy at the plea proceeding provided a sufficient factual basis for defendant's plea of guilty to the charge of child enticement. The offense of child enticement is a specific-intent crime. MCL 750.350(1); *People v Kuchar*, 225 Mich App

74, 77; 569 NW2d 920 (1997). The intent to detain or conceal a child from his or her parent is an essential element of the offense. *People v Rollins*, 207 Mich App 465, 469; 525 NW2d 484 (1994). I perceive absolutely no evidence on the record to establish that defendant acted with the requisite specific intent to detain or conceal the children from their mother. Indeed, the children's mother entrusted the children to defendant's care in the first instance. I acknowledge that defendant drove around Oakland County for hours looking for drugs with the children in the backseat of his vehicle. But the children were likely the furthest thing from his mind during this period. It appears that defendant had only one true intention while driving in his vehicle—namely, the intent to locate drugs. No rational trier of fact would believe that defendant's actual intention while he drove throughout Oakland County was to conceal or detain the children from their mother.

It strikes me that defendant's failure to return the children to their mother on time resulted more from his negligence or drug-induced absentmindedness than from any criminal intent to conceal or detain the children. While defendant's act of searching for drugs was not laudable by any means, there is no evidence to suggest that he acted with the specific intent "to detain or conceal the child[ren] from the child[ren]'s parent or legal guardian . . . ." MCL 750.350(1). Given the testimony adduced at the plea proceeding and the other evidence presented in this case, no reasonable finder of fact could conclude beyond a reasonable doubt that defendant acted with the specific intent to detain or conceal the children from their mother. *Brownfield*, 216 Mich App at 431.

I do not believe that there was a sufficient factual basis for defendant's guilty plea, see MCR 6.302(D)(1),

and I therefore conclude that the circuit court erred by accepting the plea, see MCR 6.302(A). I would remand with instructions to the circuit court to permit defendant to withdraw his plea. In all other respects, I concur with the majority's opinion.

PEOPLE v DILWORTH

Docket No. 294785. Submitted January 12, 2011, at Lansing. Decided January 25, 2011, at 9:05 a.m.

An Oakland Circuit Court jury convicted Jimmy Dilworth of third-degree fleeing and eluding, MCL 257.602a(3)(a), and of driving while his license was suspended (DWLS), MCL 257.904(1). The court, Leo Bowman, J., sentenced defendant as a fourth-offense habitual offender to concurrent terms of three years' probation and 365 days' imprisonment, with credit for 22 days served, for the fleeing-and-eluding conviction and 365 days' imprisonment, with credit for 22 days served, for the DWLS conviction. The court ordered defendant to pay $1,235 for the costs of his prosecution as a term of his probation. Defendant appealed, arguing that the court did not have the authority to order him to pay the costs of his prosecution.

The Court of Appeals *held*:

A trial court must have statutory authority to order a criminal defendant to pay costs associated with his or her trial. When authorized, those costs must bear a reasonable relation to the expenses actually incurred in the prosecution. The costs may not include expenditures made for the maintenance and functioning of governmental agencies that are to be borne by the public irrespective of specific violations of the law. Because the record in his case did not contain the justification for the $1,235 assessment, the Court of Appeals could not determine whether all of the prosecution's costs were allowable. Accordingly, remanding the case was necessary for the trial court to make a record of what the costs of prosecution were, determine whether ordering defendant to pay them was permissible, and, as appropriate, impose or deny them.

Order vacated and case remanded.

CRIMINAL LAW — COSTS OF PROSECUTION — ASSESSMENT AS A PROBATION TERM.

A trial court must have statutory authority to order a criminal defendant to pay costs associated with his or her trial; when authorized, those costs must bear a reasonable relation to the expenses actually incurred in the prosecution, and the costs may not include expenditures made for the maintenance and function-

> ing of governmental agencies that are to be borne by the public irrespective of specific violations of the law; the justification for the costs must be made part of the trial court record to allow an appellate court to determine whether the costs were allowable.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *John S. Pallas*, Chief, Appellate Division, and *Marilyn J. Day*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Christopher M. Smith*) for defendant.

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Defendant appeals by right his jury convictions of third-degree fleeing and eluding, MCL 257.602a(3)(a), and driving while his license was suspended, MCL 257.904(1). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of three years' probation and 365 days' imprisonment, with credit for 22 days served, for the fleeing-and-eluding conviction and 365 days' imprisonment with credit for 22 days served, for the conviction of driving while his license was suspended. In addition to other costs and fees assessed, the trial court ordered defendant to pay $1,235 for the costs of the prosecution as a term of his probation. On appeal, defendant argues that the trial court did not have the authority to order him to pay $1,235 in prosecution costs. We vacate the order and remand.

The trial court must have statutory authority to order a criminal defendant to pay costs associated with the trial. *People v Lloyd*, 284 Mich App 703, 707; 774 NW2d 347 (2009). Neither of the statutes that defen-

dant was convicted of violating provides any such authority, but the Legislature has the "authority to enact a general cost provision . . . ." *Id*. at 709 n 3. We review de novo questions of statutory interpretation, such as whether a statute authorizes the imposition of costs. *People v Martin*, 271 Mich App 280, 286-287; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

There are several statutes under which trial courts *may* impose costs. MCL 771.3 authorizes a trial court to order a defendant to pay costs as a condition of probation; specifically, it authorizes the assessment of costs "*incurred in prosecuting the defendant* or providing legal assistance to the defendant and supervision of the probationer." (Emphasis added.) See *People v Brown*, 279 Mich App 116, 138-139; 755 NW2d 664 (2008). Under MCL 769.1k(1)(b)(*iii*), a trial court may order the defendant to pay "[t]he expenses of providing legal assistance to the defendant." And under MCL 769.34(6), a trial court may order costs as part of the sentence. Because the Legislature has set forth specific circumstances under which trial courts may impose costs, a trial court *generally* has the discretionary authority to order a criminal defendant to pay the costs of prosecution.

When authorized, the costs of prosecution imposed "must bear some reasonable relation to the expenses actually incurred in the prosecution." *People v Wallace*, 245 Mich 310, 314; 222 NW 698 (1929). Furthermore, those costs may *not* include "expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law." *People v Teasdale*, 335 Mich 1, 6; 55 NW2d 149 (1952).

In this case, the prosecutor offered to provide the trial court with details of the expenses that were

claimed to justify the $1,235 in costs, but that information was never placed into the record. Furthermore, it appears from the transcript of the proceedings that defendant may not have been afforded the opportunity to challenge those costs. We have no way to know the extent to which the costs were imposed on the basis of appropriate charges, such as expert witness fees, *Brown*, 279 Mich App at 139, or impermissible charges, such as the assistant prosecutor's wages, which were set by a board of supervisors pursuant to a statute and independent of any particular defendant's case, see MCL 49.34. The costs imposed are likely all allowable, but as a court of record without the benefit of an adequate record, we cannot so determine.

We therefore vacate the trial court's order imposing the costs of prosecution, and we remand this matter to the trial court to make a record of what the costs were, determine whether ordering defendant to pay them is permissible, and, if appropriate, impose or deny them. We do not retain jurisdiction.

STOCK BUILDING SUPPLY, LLC v PARSLEY HOMES OF MAZUCHET HARBOR, LLC

Docket No. 294098. Submitted January 11, 2011, at Detroit. Decided January 25, 2011, at 9:10 a.m.

Stock Building Supply, L.L.C., brought an action in the Macomb Circuit Court against Parsley Homes of Mazuchet Harbor, L.L.C., and others, seeking a lien for foreclosure when the general contractor of a home-building project failed to pay for construction work done by Stock. Although it was not initially named as a defendant, Weimer Plumbing, Inc., was allowed to intervene as a plaintiff because it, too, had not been paid, and it also sought a lien for foreclosure. Weimer had contracted to install rough and finish plumbing, including installing bathroom and kitchen fixtures. Weimer had also performed repair work in May 2007 when some leaks developed while the work was still under warranty. The court, Peter J. Maceroni, J., found that Weimer had completed its construction work no later than September 2006 and concluded that Weimer's construction lien was therefore invalid because it had not been timely filed and dismissed Weimer's lien. Weimer appealed.

The Court of Appeals *held*:

The Construction Lien Act, MCL 570.1101 *et seq*., is a comprehensive scheme to protect the rights of lien claimants and the rights of property owners. MCL 570.1111(1) provides that a construction lien must be filed with the register of deeds within 90 days after the lien claimant's last furnishing of labor or material for the improvement. An "improvement" is work that confers value beyond the value furnished at the time the initial installation work was completed. It does not include the performance of warranty work to correct deficiencies in work performed or defects in fixtures installed by the contractor. The distinguishing factor between a repair constituting an improvement to the real property and warranty work is whether the work in question conferred any value beyond the value furnished by the completion of the original work. Only an improvement commences a new 90-day filing period. Weimer's May 2007 repair work did not confer any value beyond the value furnished at the time the initial installation work was completed, was not an addition to the original agreement, and was not it in furtherance of the original

agreement. It merely provided that which was originally contracted for: fully and properly functioning plumbing fixtures in a new house. The 90-day filing period provided by MCL 570.1111(1) commences when the claimant's work is completed, regardless of when or whether the work was inspected or paid for. To commence the filing period, work must constitute an improvement and be done in good faith; warranty work done in good faith is insufficient to start a new filing period. The trial court did not err by concluding that the work in May 2007 was not an improvement under the statutory definition and that the time period for filing a lien began running no later than September 2006 and had expired long before Weimer sought to file it.

Affirmed.

LIENS — CONSTRUCTION LIENS — FILING PERIOD — COMMENCEMENT.

Under the Construction Lien Act, a construction lien must be filed with the register of deeds within 90 days after the lien claimant's last furnishing of labor or material for the improvement; an "improvement" is work that confers value beyond the value furnished at the time the initial installation work was completed; it does not include the performance of warranty work to correct deficiencies in work performed or defects in fixtures installed by the contractor; the distinguishing factor between a repair constituting an improvement to the real property and warranty work is whether the work in question conferred any value beyond the value furnished by the completion of the original work (MCL 570.1104[5], 570.1111[1]).

Ronald J. Gricius, P.C. (by *Jeffrey W. Rentschler*), for Weimer Plumbing, Inc.

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

BECKERING, J. Intervening plaintiff Weimer Plumbing, Inc., appeals as of right the trial court's order dismissing its construction lien on lot 47 Mazuchet Harbor, commonly known as 39836 Mazuchet Drive, Harrison Township (lot 47), as invalid. We affirm.

I

This action arises from plumbing work Weimer performed on lot 47 for which it was not paid. Weimer is

seeking priority of its construction lien over the interests of Stock Building Supply, L.L.C., which filed the initial complaint in this case after defendant Dwight E. Parsley and six companies he created failed to pay multiple subcontractors for work performed on various new residential real properties that were being built for sale throughout Macomb County.

In August 2005, Weimer submitted a plumbing proposal for lot 47 to Parsley Homes of Mazuchet Harbor (the general contractor) for the rough and finish plumbing for the unit. Weimer's proposal was accepted, and Weimer obtained a permit for plumbing work at lot 47 on August 29, 2005. Weimer performed underground and rough plumbing work on August 31, 2005, and received payment for these services. Weimer performed finish plumbing work at lot 47 on August 4, 2006, or September 29, 2006, or both dates. According to the plumbing selection sheet for lot 47, Weimer's finish work included installing the kitchen sink, garbage disposal, and faucet, one standard bathtub with shower and faucet, one whirlpool bathtub with shower and faucet, three toilets, four bathroom sinks with faucets, a hot water heater, a laundry tub, and a laundry water box. On August 5, 2006, Weimer sent its final invoice to the general contractor.

On December 20, 2006, Weimer repaired a leak at the kitchen sink. Then, after a sales agent noticed water on the floor in one of the home's bathrooms, Weimer repaired a small leak in the whirlpool tub and replaced the ball and cock assembly of a toilet on May 29, 2007. Weimer identified this work in its answers to discovery requests as "Warranty Service Calls." There is no evidence that Weimer sent an invoice for its repair work.

On July 27, 2007, Stock filed the initial complaint in this case, which included a count seeking a lien for

foreclosure on lot 47, but it did not name Weimer as a defendant. On August 23, 2007, Weimer filed its claim of lien on lot 47 for $9,646. On October 22, 2007, Stock obtained a default judgment against the general contractor for failure to plead or otherwise defend. Subsequently, on November 5, 2007, the parties stipulated allowing Weimer to file a complaint as an intervening plaintiff, file cross-complaints, and add defendants. Weimer's complaint included a count seeking a lien for foreclosure on lot 47. As of October 24, 2008, the parties agreed that Stock had obtained a sheriff's deed and that the redemption period was over, making Stock the current owner of lot 47.

With respect to Weimer's foreclosure lien on lot 47, the trial court found that Weimer had completed its construction work in either August 2006 or September 2006. Accordingly, the court ruled that Weimer's construction lien was invalid because it was not filed within 90 days of its completion of the original installation work.

II

On appeal, Weimer argues that, contrary to the trial court's ruling, its May 29, 2007, repair work constituted an "improvement" under the Construction Lien Act, MCL 570.1101 *et seq*., and, therefore, it had 90 days from that date to file its lien. Accordingly, Weimer asserts that the filing of its lien on August 23, 2007, was timely. We disagree.

Questions regarding the interpretation and application of statutes, including the Construction Lien Act, are reviewed de novo on appeal. *Solution Source*, *Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 372; 652 NW2d 474 (2002). The Construction Lien Act is a remedial statute that sets forth a comprehensive

scheme aimed at protecting "the rights of lien claimants to payment for expenses and . . . the rights of property owners from paying twice for these expenses." *Id*. at 373-374. It is to be liberally construed "to secure the beneficial results, intents, and purposes" of the act. MCL 570.1302(1).

Section 111(1) of the Construction Lien Act, MCL 570.1111(1), *et seq*., provides:

> [N]otwithstanding [MCL 570.1109], the right of a contractor, subcontractor, laborer, or supplier to a construction lien created by this act shall cease to exist unless, *within 90 days after the lien claimant's last furnishing of labor or material for the improvement, pursuant to the lien claimant's contract, a claim of lien is recorded* in the office of the register of deeds for each county where the real property to which the improvement was made is located. A claim of lien shall be valid only as to the real property described in the claim of lien and located within the county where the claim of lien has been recorded. [Emphasis added.]

The Construction Lien Act defines an "improvement" as

> the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract. [MCL 570.1104(5).]

According to MCL 570.1111(1) and MCL 570.1104(5), a repair completed pursuant to a contract is an improvement, and the last furnishing of an improvement commences the 90-day filing period. Thus, for example, when a contractor is specifically hired to repair an aspect of the property, such as a nonworking door or a leaky roof, that contractor is making an improvement to

the property for which the contractor is entitled to claim a lien. However, as this Court held in *Woodman v Walter*, 204 Mich App 68, 69; 514 NW2d 190 (1994), the performance of "warranty work" to correct deficiencies in work performed or defects in fixtures installed by the contractor does not constitute an improvement under the Construction Lien Act because "[i]t does not confer any value beyond the value furnished at the time the initial installation work was completed." Therefore, in such situations, "[t]he ninety-day filing period commences on the date of completion of the original installation work and is not extended by the later performance of warranty work." *Id*. at 70. The distinguishing factor between a repair constituting an improvement to the real property, which allows for the commencement of the 90-day filing period, and warranty work, which does not allow for the commencement of a new 90-day filing period, is whether the work in question conferred any value beyond the value furnished by the completion of the original work.

Under its contract, Weimer was to furnish rough and finish plumbing for the home being constructed on lot 47. As previously noted, this included installing the kitchen sink, garbage disposal, and faucet, a standard bathtub with shower and faucet, a whirlpool bathtub with shower and faucet, three toilets, four bathroom sinks with faucets, a hot-water heater, a laundry tub, and a laundry water box. The record shows that Weimer's finish plumbing work was completed by September 29, 2006. Therefore, as of that date, the home at lot 47 had been improved with these presumably fully functioning fixtures.

Weimer returned to lot 47 on December 20, 2006, to repair a leak at the kitchen sink. Then, on May 29, 2007, Weimer returned again to fix a leak on the

whirlpool tub and to change the ball and cock assembly on the bathroom toilet, which it described as a "Warranty Service Call." Weimer contends that its subsequent work was done at the request of the builder and that it did not concoct the work merely to extend the lien filing time. Weimer also indicates that subcontractors are expected to make these kinds of repairs when requested by the general contractor.

Weimer's May 2007 repair work did not "confer any value beyond the value furnished at the time the initial installation work was completed." *Woodman*, 204 Mich App at 69. The May 2007 work was not an addition to the original agreement, nor was it in furtherance of the original agreement. Rather, it was performed because the original work had minor deficiencies that needed to be corrected. Weimer suggests that its service work conferred a benefit on the general contractor by providing functional indoor plumbing for the new homeowner and, thus, that this work qualified as an improvement under the Construction Lien Act. However, Weimer's May 2007 repair work did not add any value to the original contract because it merely provided that which was originally contracted for—namely, fully and properly functioning plumbing fixtures in a new house. Presumably, but for the general contractor calling Weimer because of minor deficiencies in its work, Weimer would never have provided service to lot 47 in May 2007 because it had completed its finish plumbing work by September 2006.

Additionally, Weimer's suggestion that the original contract was not completed because the general contractor never inspected the plumbing work or paid Weimer is misplaced. The correct inquiry to determine when the 90-day filing period commences is when the work is completed, not when the work is inspected or

paid for. See MCL 570.1111(1); MCL 570.1104(5); *Woodman*, 204 Mich App at 69-70. Weimer's work in May 2007 was warranty work, and pursuant to *Woodman*, it did not allow a new 90-day filing period to commence. Weimer's 90-day period for filing its lien for plumbing work performed on lot 47 commenced by September 29, 2006. Weimer did not file its lien until August 23, 2007. Plainly, Weimer's lien was untimely and, therefore, invalid. Consequently, the trial court properly dismissed Weimer's lien on lot 47.

Weimer also relies on *J Propes Electric Co v DeWitt-Newton, Inc*, 97 Mich App 295, 300; 293 NW2d 801 (1980), for the proposition that the correct inquiry here is whether the subsequent work was done in good-faith performance to complete the contract or merely as an opportunity to revive an untimely claim of lien. However, Weimer's reliance on *J Propes* is misplaced. At issue in *J Propes* was whether "assorted electrical services . . . and . . . general clean-up work" provided by the electrical subcontractor at the request of the general contractor approximately two months after the electrical contractor had substantially completed its contracted-for work on the project started the 90-day period for filing a lien. *Id.* at 298. This Court concluded that the trial court did not err by concluding that the 90-day period commenced on the date the follow-up repair work was performed. This Court observed that the work was needed after the construction project was secured for the winter and that it was part of the electrical contractor's contract for services. *Id.* at 298, 300. As previously discussed, however, Weimer completed its contract with the general contractor in September 2006. The work Weimer returned to perform in May 2007 was not part of its contract. Rather, it was work necessitated by defects in the fixtures installed or deficiencies in the initial installation work performed

by Weimer. Therefore, under *Woodman*, the correct inquiry is whether the May 2007 work constituted an improvement to the property or was warranty work. See MCL 570.1111(1); MCL 570.1104(5); *Woodman*, 204 Mich App at 69-70. For the reasons set forth earlier, the trial court correctly determined that the May 2007 work performed by Weimer was warranty work. Therefore, the trial court did not err by determining that Weimer's lien on lot 47 was invalid.

Finally, to the extent that Weimer's brief to this Court might be read to suggest that this Court could apply the substantial-compliance provision set forth in MCL 570.1302(1)[1] to Weimer's claim of lien, the Construction Lien Act's 90-day filing requirement for claims of lien is not subject to a substantial-compliance interpretation. *Central Ceiling & Partition, Inc v Dep't of Commerce*, 249 Mich App 438, 445; 642 NW2d 397 (2002). Rather, "[t]he ninety-day deadline means precisely ninety days." *Id*.

Affirmed.

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[1] MCL 570.1302 (1) provides:

> [T]his act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them.

PEOPLE v OSBY

Docket No. 295548. Submitted January 12, 2011, at Grand Rapids. Decided January 27, 2011, at 9:00 a.m.

A Berrien Circuit Court jury convicted Irby Osby, Jr., of possessing burglary tools, receiving and concealing stolen property worth $200 or more but less than $1,000, possession of marijuana, and breaking into a motor vehicle to steal property worth $200 or more but less than $1,000. The court, Sterling R. Schrock, J., sentenced him as a fourth-offense habitual offender to 58 to 240 months in prison for possession of burglary tools and to time served for the other convictions. Defendant appealed.

The Court of Appeals *held*:

1. The testimony of the wife of one victim concerning the damage to her husband's car and the items stolen from it was not hearsay under MRE 501(c) because the witness testified from her own knowledge and not from what her husband had told her.

2. MCL 750.116 prohibits the knowing possession of a tool, implement, or device adapted and designed for breaking open any building, room, vault, safe, or other depository to steal property from it. The term "depository" is a catchall phrase that includes motor vehicles. Because defendant was burglarizing motor vehicles and possessed a window punch (a device used to break car windows), there was sufficient evidence to support his conviction of possessing burglary tools.

3. Defendant's sentence was not excessive. The habitual-offender enhancement was based on defendant's earlier convictions and the court properly used its discretion in addressing any mitigating factors.

Affirmed.

CRIMINAL LAW — POSSESSION OF BURGLARY TOOLS — ELEMENTS — DEPOSITORIES.

MCL 750.116 prohibits the knowing possession of a tool, implement, or device adapted and designed for breaking open any building, room, vault, safe, or other depository to steal property held within; the term "depository" includes motor vehicles.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Mark D. Sanford*, Assistant Prosecuting Attorney, for the people.

Gary L. Kohut for defendant.

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM. A jury convicted defendant of possession of burglar's tools, MCL 750.116, receiving and concealing stolen property worth $200 or more but less than $1,000, MCL 750.535(4)(a), possession of marijuana, MCL 333.7403(2)(d), and breaking and entering a motor vehicle to steal property worth $200 or more but less than $1,000, MCL 750.356a(2)(b)(*i*). The trial court sentenced defendant to 58 to 240 months in prison as a fourth-offense habitual offender, MCL 769.12, for the conviction of possession of burglar's tools. The trial court also sentenced defendant to 161 days for the other convictions, and he received a jail credit of 161 days. Defendant now appeals and we affirm.

On March 12, 2009, there was a series of thefts involving the breaking and entering of motor vehicles. Each of the vehicles had a smashed window and property stolen from inside. All the thefts occurred in the area of St. Joseph, Michigan. A surveillance camera recorded footage of one of the thefts. The footage showed a black man walking toward one of the victims' cars from a white van. There was something in the man's hands. The police issued a BOLO (be on the lookout) for the white van seen in the surveillance footage. A similar van was spotted parked in front of a motel. The police surrounded the area and saw defendant leave the motel in the white van. The police got a warrant to search defendant's room. Inside the room,

the police found items that belonged to the victims of the thefts and a small bag of marijuana. When the police apprehended defendant, they found a "window punch" on his person, which the police believed was used to break car windows.

Defendant first argues that the trial court impermissibly allowed hearsay testimony when it allowed a victim's wife to testify about the damage to the victim's car and his stolen items. Defendant did not object to the witness's testimony at trial and so did not preserve this issue. Generally, this Court does not review unpreserved issues, but this Court may review unpreserved issues for plain error. MRE 103(d); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to avoid forfeiting an unpreserved error, a defendant has the burden of establishing that the "(1) error occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights." *Jones*, 468 Mich at 355. Here, defendant fails to prove the first prong—that the error even occurred. The witness testified from her own observation of the car after it had been damaged, and she testified from her own knowledge of the value of the victim's stolen items. MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The witness was testifying from her own knowledge, not from what her husband had told her. Therefore, there was no hearsay and defendant has failed to show that there was any plain error.

Next, defendant argues that there was insufficient evidence to convict him of possession of burglar's tools because the statute prohibiting their possession does not include a reference to motor vehicles. The statute limits

the list of tools to those used to open "any building, room, vault, safe or other depository . . . ." MCL 750.116. The statute goes on to state that the reason for breaking in must be "to steal therefrom any money or other property . . . ." *Id.* Even though unpreserved, a question of sufficiency of evidence may be reviewed de novo by this Court in a criminal case. *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Review is limited to whether failure to review would deprive the defendant of a fair trial or result in manifest injustice. *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987) (dicta). The term "depository" is a catchall phrase that includes motor vehicles. When interpreting statutes, this Court looks to the plain meaning of terms unless those terms are defined within the statute. MCL 8.3a; *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008); *People v Lee*, 447 Mich 552, 558; 526 NW2d 882 (1994). The term "depository" is defined as "[a] place where one leaves money or valuables for safekeeping." Black's Law Dictionary (9th ed). Another definition states that a "depository" is "a place where something is deposited or stored, as for safekeeping." *Random House Webster's College Dictionary* (1997). In order to store things safely within a motor vehicle, the average person locks the vehicle and assumes that the contents will be relatively safe. So, in the plain language of the statute, "depository" includes motor vehicles. Because defendant was burglarizing motor vehicles, there was sufficient evidence to convict defendant of the possession of burglar's tools.

Defendant argues that the sentence was excessive in light of the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Under *Blakely*, other than facts about prior convictions, any fact that increases a sentence beyond the statutory maximum must be submit-

ted to a jury. *Id.* at 301-302. Defendant argues that because the trial court sentenced him beyond the maximum sentence authorized for the possession of burglar's tools based on facts that were not submitted to the jury, the trial court violated *Blakely*. First, "*Blakely* does not apply to sentences imposed in Michigan." *People v Endres*, 269 Mich App 414, 423; 711 NW2d 398 (2006), citing *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), and *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005). Second, even if *Blakely* did apply in Michigan, the extended sentence here was based on defendant's earlier convictions—which is exactly the exception listed in *Blakely*. *Blakely*, 542 US at 301. *Blakely* does not apply here, and defendant's sentence was not excessive.

Defendant also argues that the trial court failed to consider mitigating factors when sentencing him. While defendant maintains that under *Blakely* the trial court is required to review all mitigating factors, we have already established that *Blakely* does not apply to sentencing in Michigan. *Endres*, 269 Mich App at 423. This issue was also not preserved below. Again, this Court may review unpreserved issues for plain error. MRE 103(d); *Jones*, 468 Mich at 355. Defendant burglarized several motor vehicles, and he is an habitual offender with an extensive history of drug abuse. The trial court properly sentenced defendant and properly used its discretion in addressing any possible mitigating factors. The trial court committed no plain error when it reviewed the factors in sentencing defendant. Defendant fails to meet his burden of proof and forfeits this unpreserved issue.

Affirmed.

LUCKOW ESTATE v LUCKOW

Docket No. 294398. Submitted January 11, 2011, at Detroit. Decided January 27, 2011, at 9:05 a.m.

Stanley Luckow obtained a divorce from Pamela Luckow in 2003 in the Wayne Circuit Court, Family Division. The divorce judgment directed plaintiff to pay defendant $2,500 a month in modifiable spousal support. After plaintiff unsuccessfully moved to reduce his spousal-support obligations in 2005, the parties agreed to binding arbitration. The resulting report recommended that plaintiff's spousal-support obligations be reduced to zero and that future spousal-support obligations be reserved for future adjudication. Plaintiff moved to adopt the arbitration report's recommendations and award. He died in 2007, and his estate was substituted as plaintiff in February 2008. The court, Richard M. Skutt, J., abated the spousal-support obligation in accordance with the arbitration award. Defendant subsequently moved to increase the amount of her spousal support after experiencing a reduction in income and suffering medical problems. Judge Skutt recognized that spousal support may be modified following a payor's death and collected from the payor's estate. He further concluded that although defendant's change in circumstances warranted consideration of the motion, it would be inequitable to raise plaintiff's spousal-support obligation given that, although plaintiff had substantial assets, as an estate it could no longer earn income. Defendant moved for reconsideration. Judge Eric W. Cholack, Judge Skutt's successor, granted the motion, noting that he disagreed with Judge Skutt's equitable determinations and ruling that Judge Skutt had palpably erred by concluding that, once the monthly spousal-support obligation had been reduced to zero, it could not be increased. Judge Cholack determined that the estate had sufficient means to pay support and that an increase in support was warranted, and he ordered an evidentiary hearing to determine the appropriate amount. The Court of Appeals granted plaintiff's delayed application for leave to appeal.

The Court of Appeals *held*:

1. Spousal support may continue, undergo modification, or be implemented for the first time following the payor spouse's death.

The death of the payor spouse may create a situation in which spousal support should be modified. The burden of proof rests on the party objecting to the previously determined amount of support. A court may implement spousal support for the first time following the payor's death if the divorce judgment reserved the question of support for further determination.

2. A party moving for reconsideration must establish that the trial court made a palpable error and that a different disposition would result from correction of the error. The successor judge's decision to grant defendant's motion for reconsideration constituted an abuse of discretion because the previous judge had not committed a palpable error in evaluating the competing equities or by having focused on plaintiff's income rather than on plaintiff's marital assets when determining whether plaintiff had the means to pay increased spousal support. A mere difference in opinion regarding the equities of the matter did not constitute a palpable error sufficient to warrant reconsideration of the decision.

Reversed.

DIVORCE — SPOUSAL SUPPORT — MODIFICATIONS — DEATH OF SPOUSAL-SUPPORT PAYORS.

Spousal support may continue, undergo modification, or be implemented for the first time following the payor spouse's death; the burden of proving the need for modification rests on the party objecting to the previously determined support amount; a court may implement spousal support for the first time following the payor spouse's death if the divorce judgment reserved the question of support for further determination.

Gentry Law Offices, P.C. (by *Kevin S. Gentry*), for the estate of Stanley Luckow.

Carl Bloetscher III for Pamela Luckow.

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

BECKERING, J. Plaintiff[1] appeals by leave granted the opinion and order of Wayne Circuit Court Judge Eric W.

[1] Although plaintiff in this action is Stanley Luckow's estate, as opposed to Stanley Luckow himself, we refer to both Stanley Luckow and his estate as "plaintiff."

Cholack granting defendant's motion for reconsideration regarding an alimony award rendered by his predecessor, Judge Richard M. Skutt. We reverse.

I. FACTUAL OVERVIEW

Plaintiff and defendant divorced on October 8, 2003. Comporting with an arbitration award previously rendered, the parties' divorce judgment directed plaintiff to pay defendant modifiable spousal support in the amount of $2,500 a month until her death or remarriage, whichever occurred first. Neither of these contingencies has transpired. The spousal-support award was based on plaintiff's annual income of $90,000 and an imputation of income to defendant of $15,000 a year. It was to be secured by naming defendant as a beneficiary of a portion of plaintiff's life insurance proceeds. Among other assets, plaintiff was awarded as part of the property division the value of his life insurance policies, subject to defendant's interest in the proceeds as security for spousal support, and the marital interest in the business partnership known as Metal Prep Technology. Defendant was awarded assets including the marital home, half of plaintiff's individual retirement account (IRA), and a portion of plaintiff's Metal Prep Technology profit-sharing account.

On January 3, 2005, plaintiff moved to reduce his spousal-support obligations, citing defendant's move to Florida and consequent lower living expenses. Plaintiff also asserted that defendant had sufficient assets to support herself and that his income, having declined since the entry of the divorce judgment, was insufficient to pay the amount ordered. Defendant opposed this motion, asserting that her living expenses had increased, not declined, as a result of her move. Defendant denied having sufficient assets to support herself

and asserted that plaintiff had sufficient means to continue paying spousal support in the ordered amount. Judge Skutt denied plaintiff's motion following an evidentiary hearing on August 12, 2005. Judge Skutt determined that plaintiff had not demonstrated a significant change in circumstance on which to base a change in spousal support and that, while plaintiff had demonstrated a decrease in his annual income, that decrease was "not so great that it equal[led] a lack of ability to pay the ordered spousal support."

Thereafter, plaintiff moved to set aside the trial court's opinion and order denying his motion for reduction of spousal support. The trial court granted that motion, and on February 9, 2006, the parties stipulated to resolve the matter by binding arbitration. The record indicates that plaintiff sold his interest in Metal Prep Technology and that he received his last paycheck from that company on September 15, 2006. On October 30, 2007, the arbitrator issued his binding arbitration report, recommending that plaintiff's obligation to pay spousal support be abated to zero but reserving future spousal-support obligations for future adjudication. As a result of the arbitrator's recommendation, it was determined that defendant was entitled to more than $35,000 in spousal-support arrearages; the arbitration award limited plaintiff's obligation to secure future spousal support by way of a life insurance policy in this arrearage amount.

On November 27, 2007, plaintiff moved the court to adopt the binding arbitration report and award. Plaintiff died on December 12, 2007. Plaintiff's estate was substituted as party plaintiff in February 2008. At that time, Judge Skutt specifically recognized that he had the authority to modify the terms and conditions of spousal support after plaintiff's death. On March 21,

2008, Judge Skutt entered an order adopting the October 30, 2007, arbitration award. As a result, plaintiff's obligation to pay spousal support was abated effective December 31, 2006. Further, in accordance with the arbitration award, Judge Skutt ordered that "[a]ny future spousal support obligation due and owing by Plaintiff to the Defendant is reserved for the future adjudication by this Court. Plaintiff's obligation to provide life insurance to secure his spousal support obligation shall be limited only to the extent of the arrears created by this Order."

On April 3, 2008, less than two weeks after Judge Skutt entered the order adopting the arbitration award, defendant moved to increase spousal support. Defendant asserted that a reduction in her annual income and anticipated increased health-insurance expenses stemming from a mild stroke, as well as plaintiff's increased ability to pay following his death, constituted a sufficient change in circumstances to warrant modification. Judge Skutt denied defendant's motion. Judge Skutt specifically recognized both that spousal support may be modified following a payor's death and that spousal support may be collected from a deceased payor's estate. He noted that he did not believe it was necessary to show a change of circumstances, but in the event that it was, defendant had established a change in circumstances warranting consideration of the motion on the basis of her own changing needs and a decrease in her income. However, considering the pertinent circumstances of the parties, Judge Skutt concluded that general principles of equity made increasing spousal support inappropriate. Judge Skutt explained:

> In the present case the Plaintiff filed a motion to decrease spousal support prior to his death. As a result of

> that motion the matter was arbitrated and the arbitration award was adopted by the Court as an Order. Therefore, while the Plaintiff was alive and earning an income of sorts it was determined that his spousal support obligation should be zero and now that the Plaintiff has deceased and is earning no income the Defendant requested that spousal support be modified/increased. In the general principles of equity [it] is difficult for the Court to reconcile abating Plaintiff's spousal support obligation to zero while Plaintiff is alive and earning an income and raising the Plaintiff's spousal support obligation after the Plaintiff has died and his estate earns no income.
>
> This Court is mindful of the Defendant's decrease in income as well as her other financial concerns regarding health insurance, however this Court is satisfied that those changes do not outweigh the general principles of equity and require an increase in spousal support. It should also be noted that, with the life insurance policy being the only known source of funds [for the estate], the issue has been previously decided by the arbitrator and was not appealed. The change of circumstances cannot be used as a collateral attac[k] on that decision.

Judge Skutt awarded defendant a portion of the proceeds of plaintiff's life insurance in an amount equal to the spousal-support arrearage.

Defendant moved for reconsideration, asserting that the order denying her motion reflected an erroneous determination that the estate had no obligation to pay alimony because alimony had been reduced to zero while plaintiff was alive and there was no estate income with which to pay alimony. Defendant also asserted in a supplemental pleading that, previously unbeknownst to her or the court, the estate held substantial assets at the time of plaintiff's death. Judge Cholack, sitting as Judge Skutt's successor, granted plaintiff's motion for reconsideration. Judge Cholack found that Judge Skutt had made a palpable

error by determining "in essence that, once spousal support had been abated to zero, it could not be increased." Judge Cholack explained that such a determination was "at odds with the statutorily modifiable character of spousal support" and with the order adopting the arbitration award, which reserved adjudication of future spousal-support obligations. Judge Cholack disagreed with Judge Skutt's assessment of the equities presented, explaining that defendant had demonstrated that the previous award of no spousal support had become insufficient to meet her needs and that, after his death, plaintiff no longer needed any funds for his own suitable support and maintenance. Judge Cholack determined that the estate had sufficient means available to pay support and that an increase in support was warranted. Therefore, he ordered an evidentiary hearing to determine the appropriate amount of spousal support. This Court granted plaintiff's delayed application for leave to appeal.

On appeal, plaintiff argues that Judge Cholack erred by granting reconsideration of Judge Skutt's decision. We agree.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision on a motion for reconsideration. *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 556-557; 692 NW2d 58 (2004). A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009). We review questions of law bearing on the trial court's decision, however, de novo. *Churchman v Rickerson*, 240 Mich App 223, 227; 611 NW2d 333 (2000).

III. BACKGROUND LAW

MCL 552.28 permits modification of spousal-support awards contained in divorce judgments:

> On petition of either party, after a judgment for alimony . . . , the court may revise and alter the judgment, respecting the amount or payment of the alimony . . . , and may make any judgment respecting any of the matters that the court might have made in the original action.

To warrant modification, however, the moving party first must establish new facts or changed circumstances arising since the prior order regarding support was issued. *Ackerman v Ackerman*, 197 Mich App 300, 301; 495 NW2d 173 (1992). If the court finds that a party has established a change in circumstances, it "must then make factual findings from which to conclude whether the alimony should be modified and, if so, by what amount." *Flager v Flager*, 190 Mich App 35, 37; 475 NW2d 411 (1991). A court considers many factors in awarding alimony, including the following:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, and (11) general principles of equity. [*Lee v Lee*, 191 Mich App 73, 80; 477 NW2d 429 (1991).]

It is well settled that spousal support may continue, undergo modification, or be implemented for the first time following the payor spouse's death. In *Flager*, this Court reversed the trial court's ruling that spousal support terminates upon the death of either spouse, explaining that

> [a]t common law, proceedings to enforce alimony would abate on the death of either party. In Michigan, however, statutory law has long provided the authority to award, modify and enforce alimony. That law has been interpreted consistently by the courts to mean that the obligation to pay alimony does not terminate by operation of law upon the death of the payor; it may be enforced against the payor's estate. The trial court has the authority, however, to modify or terminate permanent alimony upon changed circumstances, so long as it is periodic, not alimony-in-gross. [*Flager*, 190 Mich App at 36 (citations omitted).]

Further, as the Michigan Supreme Court noted in *Braffett v Braffett*, 308 Mich 506, 514; 14 NW2d 129 (1944), "[t]he death of a [payor] may create a situation where the decree for alimony should be modified. The burden of having such a decree modified rests upon the party objecting to the amount of alimony previously determined." Finally, in *Seibly v Ingham Circuit Judge*, 105 Mich 584, 585-587; 63 NW 528 (1895), the Court held that a court could implement alimony for the first time following the payor spouse's death if the decree of divorce reserved the question of alimony for further order and decree. The Court reasoned as follows:

> [I]f it results that the death of the husband ousts the court of jurisdiction to award permanent alimony, it follows that in every case where a decree is entered in the form here employed there must be a period of greater or less duration during which the wife is at the risk of losing the interest in her husband's estate which she would have under the statute of distributions but for the divorce, and without opportunity afforded her by the court to have awarded her a proper allowance of alimony. This result would be manifestly unjust. [*Id.* at 586-587.]

To hold that, as a rule, the death of the payor eliminates any further spousal-support obligation without regard to the particular circumstances pertinent to an award of spousal support would alter the balance of assets and

income struck by the court in rendering the divorce judgment and any subsequent modification orders, without regard to the provisions of the divorce judgment or to the particular equities presented. Michigan courts have refused to take this course. Plainly, defendant had the ability to move the lower court for a modification of the amount of spousal support after plaintiff's death. Equally plainly, and as correctly recognized by both Judge Skutt and Judge Cholack, the trial court had the authority to entertain and decide that motion, particularly given that the order adopting the arbitration award reserved any future support obligation for future adjudication.

IV. ABSENCE OF PALPABLE ERROR

Plaintiff first argues that the grant of reconsideration must be reversed because Judge Cholack misread Judge Skutt's decision as including a palpable error when, in fact, Judge Skutt's reasoning was sound. We agree. A party bringing a motion for reconsideration must establish that (1) the trial court made a palpable error and (2) a different disposition would result from correction of the error. MCR 2.119(F)(3); *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003). "Palpable" is defined as " '[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest.' " *Stamp v Mill Street Inn*, 152 Mich App 290, 294; 393 NW2d 614 (1986), quoting Black's Law Dictionary (5th ed), p 1000.

Judge Skutt found a change in circumstances sufficient to warrant considering a modification of spousal support. Further, he turned to existing caselaw to conclude that "although the [p]laintiff is deceased, spousal support *can* be modified and collected against [p]laintiff's estate." (Emphasis added.) In his discre-

tion, however, he declined to increase spousal support in this case. He stated that even when a change in circumstances exists, "the Court must examine all the circumstances of the case when deciding whether to modify spousal support." As Judge Skutt properly noted, one factor a court must consider is general principles of equity. Judge Skutt could not, considering equitable principles, reconcile abating plaintiff's support obligation during his lifetime, when he earned an income, with raising his obligation after his death, when his estate earned no income. Judge Skutt considered other factors as well, such as defendant's loss of income and her increased health costs. On balance, however, he found that these considerations did not outweigh the general principles of equity and, in an exercise of his discretion, denied defendant's motion to increase spousal support.

Judge Cholack found palpable error in Judge Skutt's decision. Judge Cholack read Judge Skutt's decision to mean that "once spousal support had been abated to zero, it could not be increased." This was an inaccurate reading of Judge Skutt's opinion. As demonstrated earlier, Judge Skutt clearly acknowledged that he had the authority to increase spousal support after it had been abated to zero and even though the payor spouse had since died; in his discretion, considering all the circumstances presented and applying general principles of equity, he simply chose not to do so. Further, to the extent that Judge Cholack found error in Judge Skutt's consideration of general principles of equity, a mere difference in opinion regarding the equities of the matter does not constitute a palpable error sufficient to warrant reconsideration of the decision.

Additionally, defendant suggests that Judge Skutt palpably erred by focusing on the income of the estate,

rather than its assets, when evaluating the competing equities and when determining whether the estate had the means to pay spousal support. Judge Skutt acknowledged that the assets of the estate were substantial, but he recognized that the primary assets of the estate were life insurance policies, which were awarded to plaintiff as part of the property division.[2] A court need not require a party to invade the corpus of the party's award of marital assets in order to pay spousal support. *Torakis v Torakis*, 194 Mich App 201, 205; 486 NW2d 107 (1992); *Zecchin v Zecchin*, 149 Mich App 723, 735; 386 NW2d 652 (1986). Therefore, to the extent that the estate is composed of assets awarded to plaintiff as part of the property division, Judge Skutt did not abuse his discretion by declining to order that those assets be made available for the payment of spousal support to defendant.[3]

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[2] At the hearing on defendant's motion to increase spousal support, it was represented to Judge Skutt that the primary assets of the estate were the proceeds of life insurance policies, which would amount to approximately $300,000. It was also noted that there was an IRA or 401(k) account, of which defendant was entitled to a portion as part of the property division. As the estate inventory would later show, the proceeds of the life insurance policies and annuities apparently were in excess of $460,000. The remainder of the estate's assets appears to be composed primarily of proceeds from the sale of plaintiff's interest in Metal Prep Technology, which was also awarded to him as part of the property division, and his profit-sharing account in Metal Prep Technology, which was subject to a qualified domestic relations order. While a substantial change in the value of the estate may have represented changed circumstances from those existing at the time of Judge Skutt's decision, defendant's representations that the estate was larger than Judge Skutt understood, under the circumstances presented here, does not establish that Judge Skutt made a palpable error by ruling that a modification of spousal support was not warranted on the facts presented to him.

[3] This is not to say that a trial court necessarily abuses its discretion by considering the value of marital assets awarded to the payor when considering the payor's ability to pay spousal support. "The objective of spousal support is to balance the incomes and needs of the parties in a

Given the absence of any palpable error in Judge Skutt's opinion and order, Judge Cholack's decision to grant defendant's motion for reconsideration fell outside the range of principled outcomes, constituting an abuse of discretion.

Reversed.

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way that will not impoverish either party, and support is to be based on what is just and reasonable under the circumstances" of each case. *Woodington v Shokoohi*, 288 Mich App 352, 356; 792 NW2d 63 (2010); see also *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). Indeed, the source and amount of property awarded is a factor expressly to be considered by the trial court in determining whether, and to what extent, to award spousal support. *Woodington*, 288 Mich App at 356; *Lee*, 191 Mich App at 80. Just as there are circumstances in which it proves necessary for a payee spouse to rely on the marital assets awarded to him or her to meet his or her financial expenses, it may be appropriate, considering the circumstances and equities presented in a particular case, for a court to award spousal support in an amount that may require the payor to invade his or her marital-asset award. However, we need not decide whether the instant appeal presents such a case because that issue is not before us. Nor, on the record provided, do we have sufficient factual information to permit us to make such a decision. Rather, we conclude only that Judge Skutt did not abuse his discretion by not requiring plaintiff to invade the marital-assets award to him in order to pay spousal support.

McCAHAN v BRENNAN

Docket No. 292379. Submitted October 7, 2010, at Lansing. Decided February 1, 2011, at 9:00 a.m.

Christina McCahan was injured in an automobile accident on the campus of the University of Michigan on December 12, 2007. The other driver, Samuel K. Brennan, was driving a car owned by the university and was on university business at the time. On May 7, 2008, plaintiff's counsel sent a letter to the university, indicating that counsel intended to represent plaintiff in a lawsuit concerning the accident. On October 31, 2008, plaintiff filed a notice of intent to file a claim in the Court of Claims. After plaintiff brought the action against Brennan and the University of Michigan Regents in the Court of Claims, the university sought summary disposition on the basis that the notice of intent to file the claim had not been filed within the period provided in MCL 600.6431(3). The court, Archie C. Brown, J., agreed with the university and granted summary disposition in its favor. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 600.6431(3) clearly states that plaintiffs with property damage or personal injury claims against the state must file a notice of intention to file the claim or the claim itself in the Court of Claims within six months of the event giving rise to the claim. Substantial compliance does not satisfy the statute. The facts show that plaintiff did not file the notice of intent within six months of the accident and, therefore, did not comply with the requirements of MCL 600.6431(3).

2. The university did not have to show that it was prejudiced by plaintiff's failure to comply with the clear requirements of MCL 600.6431(3). Like the statute in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), which also set forth a notice requirement, the statute in this case is straightforward, clear, unambiguous, and not constitutionally suspect, and it must be enforced as written. The court properly granted summary disposition in favor of the university.

Affirmed.

FITZGERALD, J., dissenting, stated that the decision in *May v Dep't of Natural Resources*, 140 Mich App 730 (1985), which held that a plaintiff's claims were not barred by a failure to comply with MCL 600.6431(3) unless the defendant established that it was prejudiced by the noncompliance, had not been reversed or specifically overruled and should be followed in this case. The Supreme Court did not construe the language of MCL 600.6431(3) in *Rowland*, when, in interpreting MCL 691.1404(1), it held that the defendant was not required to show actual prejudice resulting from the plaintiff's failure to comply with a statutory filing requirement. Because the statutes in *May* and *Rowland* differed and the Supreme Court has not extended the *Rowland* holding to MCL 600.6431(3), *May* should control the decision in this case. The order granting summary disposition should be reversed and the case should be remanded for trial because the university, as a result of the May 7, 2008, letter from plaintiff's counsel, had actual knowledge of plaintiff's intention to file the claim within six months following the accident.

ACTIONS — COURT OF CLAIMS — NOTICE OF INTENT TO FILE A CLAIM — CONDITIONS PRECEDENT TO BRING AN ACTION — SUBSTANTIAL COMPLIANCE WITH NOTICE REQUIREMENTS — PREJUDICE.

The requirement stated in MCL 600.6431(3), that in all actions against the state for property damage or personal injuries the claimant must file with the clerk of the Court of Claims a notice of intention to file a claim or the claim itself within six months following the event giving rise to the cause of action, is a condition precedent to suing the state; substantial compliance does not satisfy the statute, and the state is not required to show actual prejudice when a plaintiff fails to comply with the statutory notice requirement.

Moss & Colella, P.C. (by *Christian P. Collis*), and *Allan Falk, P.C.* (by *Allan Falk*), for Christina McCahan.

Pear Sperling Eggan & Daniels, P.C. (by *Karl V. Fink*, Special Assistant Attorney General), for the University of Michigan Regents.

Before: SAWYER P.J., and FITZGERALD and SAAD, JJ.

SAWYER, P.J. Plaintiff appeals the Court of Claims' order granting the University of Michigan Regents (the university) summary disposition. MCR 2.116(C)(8) and (10). We affirm.

On December 12, 2007, plaintiff was injured in a car accident with a student, Samuel Brennan, on the University of Michigan's campus. The student was driving a car owned by the university, while on university business. On May 7, 2008, plaintiff's counsel sent a letter to the university indicating that plaintiff's counsel intended to represent plaintiff in a lawsuit over the car accident. On October 31, 2008, plaintiff filed a notice of intent to file a claim in the Court of Claims that was signed by plaintiff and plaintiff's counsel. After plaintiff filed an action against Brennan and the university, the trial court granted summary disposition in favor of the university because plaintiff had not complied with MCL 600.6431(3).

The language of MCL 600.6431 clearly states the steps a plaintiff must take in order to make a claim against the state:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
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> * * *
>
> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

The filing requirement is a condition precedent to sue the state. See *Reich v Hwy Comm*, 43 Mich App 284, 287-289; 204 NW2d 226 (1972). When interpreting statutes, the court looks to the language of a statute first. Only if a statute is ambiguous or in conflict with another provision does a court clarify through judicial construction. *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 157, 166; 680 NW2d 840 (2004). The Legislature is presumed to have written the statute to mean what the Legislature intended it to mean. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). MCL 600.6431(3) clearly states that plaintiffs with personal injury claims shall file a notice of intention to file the claim or the claim itself in the Court of Claims within six months of the event giving rise to the claim.

Plaintiff argues that she has substantially complied with the statute, but substantial compliance does not satisfy MCL 600.6431(3). Subsection (3) clearly states that a "claimant *shall* file with the clerk of the court of claims . . . within 6 months following the happening of the event . . . ." (Emphasis added.) The word "shall" designates a mandatory provision. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008); *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006). Clear statutory language must be enforced as written. *Fluor Enterprises, Inc v Treasury Dep't*, 477 Mich 170, 174; 730 NW2d 722 (2007); *People v Gillis*, 474 Mich 105, 115; 712 NW2d 419 (2006). Here, because plaintiff brought a personal injury claim, plaintiff had to file a notice of intention to file a claim with the Court of Claims within six months of the accident. She did not. The facts show that plaintiff filed a notice of intention to file a claim with the Court of Claims months past the

six-month statutory requirement. Plaintiff did not comply with the requirements of MCL 600.6431(3).

Plaintiff also argues that the state must show prejudice when a plaintiff does not comply with a statutory filing requirement. But in *Rowland*, the Michigan Supreme Court overturned several cases that had required the state to show actual prejudice when a plaintiff failed to comply with a statutory filing requirement. *Rowland*, 477 Mich at 200, 213. The Court in *Rowland* stated that because the language of the statute at issue in that case was clear regarding its notice requirement, the Court would not give the statute any judicial construction. The filing requirement was strictly applied. *Id.* at 200 (interpreting the 120-day filing requirement of MCL 691.1404). The Court in *Rowland* returned to the well-founded principle that the Legislature is presumed to have written what the Legislature meant, and courts will not use judicial construction where the meaning of a statute is clear. *Id.* at 219. The filing requirement must be applied as it is written.

We recognize that *Rowland* dealt with a different notice requirement than does this case. There does not appear to be any published decision of either this Court or the Supreme Court that definitively determines whether the *Rowland* rationale should also be applied to the notice requirements of MCL 600.6431. Indeed, two justices of the Supreme Court disagreed on this point in separate statements to an order denying leave to appeal in *Beasley v Michigan*, 483 Mich 1025 (2009). Then Chief Justice KELLY, in her concurring statement, rejected the defendant's argument that *Rowland* should be applied to the notice provision of MCL 600.6431(3), concluding that *Rowland* was distinguishable because it dealt with a different statutory provi-

sion. *Id*. at 1025 (KELLY, C.J., concurring). Justice CORRIGAN, on the other hand, in her dissenting statement to the order denying leave to appeal, opined that *Rowland* does apply to the notice provisions of MCL 600.6431. In particular, she noted that *Rowland* "rejected earlier caselaw that had assumed notice provisions are unconstitutional if they do not contain a prejudice requirement," as well as the fact that the notice requirement in *Rowland* "is substantively identical" to the notice provisions of MCL 600.6431. *Id.* at 1028 (CORRIGAN, J., dissenting). Justice CORRIGAN also noted that the statute clearly provides that no claim may be maintained unless the notice is filed with the Court of Claims, which did not happen. *Id.*

We conclude that Justice CORRIGAN's view represents the better interpretation of the issue. While *Rowland* did directly deal with a claim arising under the defective-highway exception to governmental immunity, we, like Justice CORRIGAN, are not persuaded that the *Rowland* rationale is somehow limited to MCL 691.1404. Indeed, one of the cases that *Rowland* reviewed and rejected, *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973), overruled by *Rowland*, 477 Mich 197, dealt with a six-month notice requirement under the Motor Vehicle Accident Claims Act, MCL 257.1118. In rejecting *Carver* and other cases, *Rowland* stated that "[i]n reading an 'actual prejudice' requirement into the statute, this Court not only usurped the Legislature's power but simultaneously made legislative amendment to make what the Legislature wanted—a notice provision with no prejudice requirement—impossible." *Rowland*, 477 Mich at 213. Ultimately, *Rowland*, 477 Mich at 219, concluded that "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written." The same can be said

of MCL 600.6431(3).[1]

In sum, plaintiff did not comply with the plain language of the filing requirement of MCL 600.6431(3). Subsection (3) clearly requires that a plaintiff with a personal injury claim against the state must file a notice of intention to file the claim or the claim itself with the clerk of the Court of Claims within six months of the event giving rise to the claim. Plaintiff did not file her notice of intention to file a claim with the Court of Claims until several months after the six-month deadline had passed. Accordingly, the Court of Claims properly granted summary disposition to the university.

Affirmed. Defendant University of Michigan Regents may tax costs.

SAAD, J., concurred.

FITZGERALD, J. (*dissenting*). The majority concludes, on the basis of *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), that plaintiff's failure to comply with the plain language of the notice requirement of MCL 600.6431(3) mandated summary disposition in favor of the University of Michigan Regents (the university). Because the case before us construes a

[1] Judge SAWYER acknowledges that he was previously a member of a Court of Appeals panel that issued an opinion that reached a different conclusion. *Cunmulaj v Chaney*, unpublished opinion per curiam of the Court of Appeals, issued February 12, 2009 (Docket Nos. 282264 and 282265). Specifically, that opinion reached the conclusion that "[t]here is no reason to extend our Supreme Court's holding [in *Rowland*] to overturn the previous standard of substantial compliance with statutory notice requirements in other statutes." *Id.* at 3. Because *Cunmulaj* is an unpublished opinion, it is of course not precedentially binding. MCR 7.215(C)(1). Judge SAWYER, upon giving the matter further consideration, is now persuaded that *Cunmulaj* erroneously decided this point and disavows that opinion to the extent that it conflicts with the opinion in the case at bar.

statute other than MCL 691.1404, I respectfully dissent for the reasons stated by Chief Judge MURPHY in his dissenting opinion in *Prop & Cas Ins Co of the Hartford v Dep't of Transp*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2010 (Docket No. 285749), which I quote in relevant part and whose reasoning I adopt:

> Because *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), did not construe the language in MCL 600.6431(3), and because our Supreme Court has evidently decided not to extend the holding in *Rowland* to MCL 600.6431(3), I am not prepared to disavow *May v Dep't of Natural Resources*, 140 Mich App 730; 365 NW2d 192 (1985). In *May*, this Court held that a plaintiff's claims are not barred by failure to comply with MCL 600.6431(3) unless the defendant established that it was prejudiced by the noncompliance. *May* has not been reversed or explicitly overruled.
>
> *Rowland* interpreted MCL 691.1404(1), which differs from the statute at issue here, MCL 600.6431(3). MCL 691.1404(1) provides that compliance with the notice provision is "a condition to any recovery for injuries sustained by reason of any defective highway;" however, MCL 600.6431(3) does not contain comparable "recovery precondition" language. More importantly, our own Supreme Court does not appear to be prepared to extend the holding in *Rowland* to MCL 600.6431(3). In *Beasley v Michigan*, 483 Mich 1025; 765 NW2d 608 (2009), the Michigan Supreme Court denied an application for leave to appeal relative to an order of this Court that had denied leave to appeal, which in turn pertained to an order by the Court of Claims denying summary disposition to the state. As reflected in a concurring opinion issued by CHIEF JUSTICE KELLY in *Beasley*, the state brought the motion for summary disposition on the basis that the plaintiff, who had been injured in a motor vehicle accident involving a state-owned vehicle, failed to comply with the notice requirement of MCL 600.6431(3). Thus, while I recognize that Supreme Court orders denying leave do not have preceden-

> tial value, the order does appear to signal a mindset that *Rowland* is inapplicable to MCL 600.6431(3). . . .
>
> Until the Supreme Court decides to substantively address the impact of *Rowland* on MCL 600.6431(1), which I encourage it to do as soon as possible, I will continue to recognize and respect this Court's decision in *May*. In my opinion, it defies logic to dismiss plaintiffs' claims here, where in *Beasley* the plaintiff is being permitted to proceed in the Court of Claims with the apparent blessing of the Supreme Court.

I would reverse the order granting summary disposition in favor of the university. While in some cases under MCL 600.6431(3) a remand for a determination whether a defendant can establish that it was prejudiced by a plaintiff's failure to file a claim with the Court of Claims within six months of the accident will be warranted, such a remand in this case is not necessary. The accident occurred on December 12, 2007. On May 7, 2008, plaintiff's counsel sent a letter to the university, addressed to the office of legal counsel, indicating that plaintiff's counsel intended to represent plaintiff in a lawsuit over the accident. On May 28, 2007, a senior claims representative of the University of Michigan Risk Management Services sent a letter to plaintiff's counsel acknowledging counsel's letter and indicating that the university would conduct a full investigation into the accident. The representative also requested additional information about the accident. The university's counsel was also provided a copy of the letter from the representative. Clearly, the university had actual knowledge of plaintiff's intention to file a claim within six months following the accident. Under these circumstances, I would remand for trial.

In re MS

Docket No. 294832. Submitted January 12, 2011, at Detroit. Decided February 1, 2011, at 9:05 a.m.

MS, a juvenile, was charged with and entered a plea of admission to a misdemeanor count of fourth-degree criminal sexual conduct (CSC) in the Oakland Circuit Court, Family Division. The court terminated its jurisdiction in 2000. In 2008, MS petitioned the court to remove his name from the sex offender registry. The court, Eugene A. Moore, J., denied the petition, concluding that the petition was untimely under MCL 28.728c(4). MS appealed.

The Court of Appeals *held*:

MCL 28.728c(15) allows juveniles convicted of first-, second-, or third-degree CSC or charged with those crimes and convicted of certain lesser offenses to petition the court by October 1, 2007, or within three years of discharge from the court's jurisdiction to remove their names from the sex offender registry if certain circumstances exist. Thus, MS's petition was untimely. While he argued that the statute was unconstitutional because it failed to require that offenders be notified of the time limits, there is no provision allowing juveniles initially charged with fourth-degree CSC to petition for removal of their names from the registry. The statute limits eligibility to petition to certain individuals charged with or convicted of first-, second-, or third-degree CSC. The trial court did not err by denying MS's petition.

Affirmed.

CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — JUVENILES — PETITIONS FOR REMOVAL FROM SEX OFFENDER REGISTRY.

Juveniles convicted of first-, second-, or third-degree criminal sexual conduct or charged with those crimes and convicted of certain lesser offenses may petition the court to remove their names from the sex offender registry in certain circumstances, but there is no provision allowing juveniles initially charged with fourth-degree criminal sexual conduct to petition for removal of their names from the registry (MCL 28.728c[15]).

Sterling & Schilling, P.C. (by *Ronald F. Schilling*), for MS.

Jessica R. Cooper, Prosecuting Attorney, and *Danielle Walton*, Assistant Prosecuting Attorney, for the Oakland County Prosecuting Attorney.

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

O'CONNELL, P.J. Petitioner, MS, appeals by delayed leave granted the denial of his petition seeking removal from the sex offender registry under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. We affirm.

In 1999, when MS was 13 years old, the Oakland County Prosecutor filed a delinquency proceeding and petition alleging three counts of fourth-degree criminal sexual conduct (CSC) against him under MCL 750.520e(1)(b).[1] MS entered a plea of admission to one misdemeanor count of fourth-degree CSC.[2] The trial court placed MS in the intensive probation program and terminated its jurisdiction over MS on November 29, 2000, when he was 15 years old. Nearly eight years later, on July 31, 2008, MS filed his petition for removal from the sex offender registry.

The trial court denied MS's petition as untimely under MCL 28.728c(4). At the hearing on the petition, the trial court stated, "The statute is very clear. I don't agree with the statute. . . . [B]ut I'm bound by the statute." The court then inquired of MS:

> *Court*: . . . You've graduated from college, and have had no problems?

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[1] All counts involved a single victim; the record indicates the victim was 13 years old.

[2] The trial court's order of adjudication listed the Prosecutor's Advisory Coordinating Council charge code "750.520e1A," which, according to the August 2003 Bench Guide, refers to criminal sexual conduct-fourth degree (force or coercion). State Court Administrative Office, et al., *Criminal Records Reporting MCL/PACC Charge Codes* (11th ed), p 120.

[*MS*]: Yes, your Honor.

Court: Completed probation?

[*MS*]: Yes, everything.

Court: And you're how old, now?

[*MS*]: I am—what was that?

Court: How are you now [sic]?

[*MS*]: I'm 23 years old.

Court: Ten years. I mean, this is the typical example of the person who should not have—still be on the registry. But I didn't write the statute. [Defense counsel] is an excellent lawyer, and my suggestion is you sit down and write a letter to your State Representative. Maybe they'll change the statute, but I'm bound by the statute and the motion is denied.

This Court has summarized the SORA provision that allows certain juvenile offenders to be removed from the sex offender registry:

> Certain juveniles required to register as sex offenders who are identified under MCL 28.728c may petition the court in which they were convicted to limit or terminate the registration requirement. Pertinent to this case, MCL 28.728c(1) provides that "[a]n individual described in subsection (15) [MCL 28.728c(15)] who is convicted before October 1, 2004 of a violation described in that subsection may petition the court under this section for an order allowing him or her to register under this act as provided in section 8d(1) [MCL 28.728d(1)]." Once an individual is permitted to register under [MCL 28.728d(1)], the lower court is vested with discretion to cease the registration process. [*People v Hesch*, 278 Mich App 188, 192-193; 749 NW2d 267 (2008).]

To file a timely petition to be removed from the registry under MCL 28.728c(4), an offender who was convicted prior to October 1, 2004, must file the petition before October 1, 2007, or within three years of discharge from court jurisdiction.

MS filed his petition in 2008, nearly eight years after his discharge from the trial court's jurisdiction. According to MCL 28.728c(4), the petition was untimely. MS argues, however, that MCL 28.728c(4) is unconstitutional on the ground that the statute failed to provide that offenders be notified of the statutory time limits.

We review de novo questions of law, including constitutional questions. *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005); *In re Wentworth*, 251 Mich App 560, 561; 651 NW2d 773 (2002). However, we will not address constitutional issues when, as here, we can resolve an appeal on alternative grounds. *People v Krezen*, 427 Mich 681, 713 n 32; 397 NW2d 803 (1986) (LEVIN, J., dissenting); *Wayne Co v Hathcock*, 471 Mich 445, 456 n 10; 684 NW2d 765 (2004).

The SORA provisions at issue apply to juvenile offenders convicted of first-, second-, or third-degree CSC. MCL 28.728c(1) and (15). Specifically, MCL 28.728c(1) provides that "[a]n individual described in [MCL 28.728c(15)] who is convicted before October 1, 2004 of a violation described in that subsection may petition the court under this section for an order allowing him or her to register under this act as provided in [MCL 28.728d(1)]." MCL 28.728c(15) states:

> The right to petition under this section applies to all of the following individuals:
>
> (a) An individual who is convicted as a juvenile under . . . MCL 750.520b [first-degree CSC], 750.520c [second-degree CSC], [or] 750.520d [third-degree CSC], . . . of committing, attempting to commit, or conspiring to commit a violation solely described in [those sections] if [certain circumstances exist].
>
> * * *

> (b) An individual who was charged under . . . MCL 750.520b, 750.520c, [or] 750.520d, with committing, attempting to commit, or conspiring to commit a violation solely described in [those sections] and is convicted as a juvenile of violating, attempting to violate, or conspiring to violate . . . MCL 750.520e [fourth–degree CSC] [or] 750.520g, if [certain circumstances exist].

The subsection plainly limits the eligibility to petition to individuals charged with first-, second-, or third-degree CSC or convicted of those crimes.

In contrast, the record in this case indicates that MS was charged with fourth-degree CSC and entered a plea of admission to the same charge. Thus, he has no right to petition under the statute. We recognize that it seems paradoxical to allow first-, second-, and third-degree CSC juvenile offenders to terminate registration, but preclude fourth-degree CSC juvenile offenders from terminating their registrations. Respondent notes that fourth-degree CSC juvenile offenders are not included on the *public* sex offender registry and posits that our Legislature determined that these offenders did not require the opportunity to be removed from the registry.[3] This does not explain, however, why MCL 28.728c(15)(b) allows an offender who was charged with third-degree CSC but convicted of fourth-degree CSC to petition for removal from the registry. Nonetheless, the statute is unambiguous, and we must apply it as written. *People v Barrera*, 278 Mich App 730, 735-736; 752 NW2d 485 (2008). Despite MS's apparently clean record

[3] Respondent also argues that the trial court lacked jurisdiction to hear MS's petition. We disagree. MCL 28.728c(4) provides that "[a] petition filed under this section shall be filed in the court in which the individual was convicted of committing the listed offense." Although the Legislature did not expressly state that the family division of the circuit court has jurisdiction to entertain a petition for removal from the sex offender registry, it appears that MCL 28.728c implicitly expanded the jurisdiction of the court to allow the court to entertain the petition.

during the past 10 years, the charge of fourth-degree CSC at age 13 precluded him from petitioning for removal from the sex offender registry.

Affirmed.

TITAN INSURANCE COMPANY v HYTEN

Docket No. 291899. Submitted August 5, 2010, at Detroit. Decided February 1, 2011, at 9:10 a.m.

Titan Insurance Company filed an action in the Oakland Circuit Court against McKinley Hyten, Howard Holmes, and Martha Holmes, seeking a declaratory judgment allowing it to reform an automobile no-fault insurance policy it had issued to Hyten in August 2007 by reducing the liability coverage limits to the statutory minimums. The policy included liability limits in excess of the statutory minimums. At the time Titan issued the policy, Hyten's driver's license had been suspended, but she expected to get it back soon and did not indicate on the application that her license was suspended. In September 2007, her license was restored. The following February, she had a motor vehicle accident in which the Holmeses were injured. Titan alleged that had it been informed that Hyten had a suspended license, it would not have issued the policy. Farm Bureau Insurance, the Holmeses' insurer, was allowed to intervene in the action. Farm Bureau, Titan, and Hyten filed cross-motions for summary disposition. The court, Edward Sosnick, J., denied Titan's motion and granted summary disposition to Hyten and Farm Bureau, concluding that the evidence did not clearly show fraud and that Titan could have easily ascertained whether Hyten had a valid driver's license. Titan appealed.

The Court of Appeals *held*:

1. MCL 257.520(f)(1) prohibits an insurer from using fraud as a basis to void completely coverage under an insurance policy once an innocent third party has been injured, but in light of the provisions of MCL 257.520(g), an insurer may use fraud as a defense to void optional insurance coverage in excess of the statutory minimum amounts. An insurer may not deny coverage on the basis of fraud after it has collected premiums, however, when it easily could have ascertained the fraud at the time the contract was formed. The insurer must undertake a reasonable investigation of the insured's insurability within a reasonable time from the acceptance of the application and the issuance of a policy, a duty that directly inures to the benefit of third persons injured by the insured, such as the Holmeses. Titan's agent could have easily ascertained whether Hyten had a license. Because the coverage implicated was for the benefit of

innocent third parties, Titan could not reform Hyten's policy to reduce the residual coverage to the statutory minimum limits. The trial court did not err by granting Hyten and Farm Bureau judgment as a matter of law.

2. Moreover, MCL 500.3220 permits an insurer to cancel a no-fault policy if the risk is unacceptable to the insurer, but only within 55 days of the policy's issuance. If the insurer opted against undertaking an investigation of the risk it was insuring within that time, it may not use later-acquired information to terminate its policy obligations except under very limited circumstances. Titan's reliance on Hyten's representations could not qualify as reasonable in light of the public policy expressed in the no-fault act and MCL 500.3220.

3. Hyten's prior innocent misrepresentation lost its effectiveness as a potential ground for cancelling the policy once she received her license. In the absence of evidence that Titan would not have insured Hyten after she obtained her license, her change of circumstances cured the misrepresentation and Titan had no equitable basis for recession or reformation.

4. Farm Bureau had standing to challenge Titan's attempt to reform the policy because as the Holmeses' insurer, its rights might have been affected if it had to cover the costs of their injuries.

Affirmed.

ZAHRA, J., did not participate.

1. INSURANCE — NO-FAULT — MISREPRESENTATION BY APPLICANT — REFORMATION OF POLICY — EASILY ASCERTAINABLE MISREPRESENTATION.

An insurer may not use fraud as a basis to void completely coverage under an insurance policy once an innocent third party has been injured, but an insurer may use fraud as a defense to void optional insurance coverage in excess of the statutory minimum amounts; an insurer may not deny coverage on the basis of fraud after it has collected premiums, however, when it easily could have ascertained the fraud at the time the contract was formed (MCL 257.520[f][1], [g]).

2. INSURANCE — NO-FAULT — MISREPRESENTATION BY APPLICANT — EASILY ASCERTAINABLE MISREPRESENTATION — FAILURE TO REASONABLY INVESTIGATE — ESTOPPEL.

An insurer may cancel a no-fault policy if the risk is unacceptable to the insurer, but only within 55 days of the policy's issuance; if the insurer opts against undertaking an investigation of the risk it is insuring within that time, it may not use later-acquired information to terminate its policy obligations except under very limited circumstances (MCL 500.3220).

Law Offices of Ronald M. Sangster, PLLC (by *Ronald M. Sangster*), for Titan Insurance Co.

William E. Ziem for McKinley Hyten.

Kopka, Pinkus, Dolin & Eads, P.L.C. (by *Mark L. Dolin*), for Farm Bureau Insurance.

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

GLEICHER, P.J. In an insurance application submitted to plaintiff, Titan Insurance Company, on August 24, 2007, defendant McKinley Hyten represented that she possessed a valid driver's license as of that date. In reality, Hyten's license had been suspended and was not restored until nearly a month later, on September 20, 2007. In February 2008, Hyten was involved in an automobile accident in which defendants Martha Holmes and Howard Holmes suffered injuries. On the basis of Hyten's misrepresentation that she held a license on August 24, 2007, Titan sought to reform Hyten's policy by reducing to the statutory minimum the excess liability coverage available to the Holmeses. The circuit court denied Titan this equitable remedy on the ground that Titan could have easily ascertained Hyten's misrepresentation of her licensing date. We affirm the circuit court's order denying Titan's motion for summary disposition and granting summary disposition in favor of Hyten and intervening defendant Farm Bureau Insurance.

I. UNDERLYING FACTS AND PROCEEDINGS

Hyten obtained a provisional driver's license in April 2004. Over the next 2½ years, she incurred multiple moving violations and had two minor traffic accidents. On January 6, 2007, the Secretary of State suspended

Hyten's driver's license. Meanwhile, Hyten's mother, Anne Johnson, inherited a 1997 Dodge Stratus. Johnson "earmarked" the vehicle for Hyten's use after the suspension was lifted. Based on assurances from Hyten's probation officer, Johnson anticipated that Hyten's license would be restored at a scheduled court date of August 24, 2007.

On August 22, 2007, in preparation for Hyten's license restoration, Johnson spoke by telephone with an insurance agent, Brett Patrick.[1] Patrick filled out a Titan Insurance Michigan automobile insurance application on Hyten's behalf. Johnson informed Patrick that Hyten's driver's license was suspended, and Patrick responded that Hyten could not be insured until her driving privileges had been reinstated. Johnson advised Patrick that Hyten's license would likely be reinstated on August 24, 2007. Patrick postdated the application to August 24, 2007. The application did not identify that any of the drivers in Hyten's household were unlicensed or had their licenses suspended or revoked as of that date. Johnson paid $719 for the Titan insurance premium by credit card over the telephone. The same day or the next day, Hyten signed the application at Patrick's office, after "skim[ming] over" its contents to confirm the accuracy of the make and model of her car.[2] The Titan policy took effect on August 24, 2007, with coverage limits of $100,000 per person and $300,000 per occurrence.

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[1] Although somewhat unclear from the record, Patrick was an independent insurance agent who had authority to issue Titan insurance policies to qualifying customers.

[2] Hyten did not identify exactly when she signed the insurance application, but averred that she went to Patrick's office a day or two before her hearing on August 24, 2007. Hyten dated her signature on the application August 22, 2007.

Hyten and Johnson appeared in court on August 24, 2007, where they learned that Hyten would not regain her driving privileges until she completed a driver's assessment. The Stratus stayed in storage until September 20, 2007, when the court restored Hyten's license. Neither Hyten nor Johnson notified Patrick that Hyten's license remained suspended on August 24, 2007. Johnson averred in an affidavit, "I fully expected the car to remain insured while it was stored and that, upon my daughter receiving her license to drive, the insurance policy would be in effect." On February 10, 2008, approximately five months after the reinstatement of Hyten's license, Hyten had a motor vehicle accident involving the Holmeses. The Holmeses both sustained injuries in the accident.

Titan filed a complaint in the Oakland Circuit Court seeking a declaration reforming Hyten's insurance policy by reducing the liability coverage limits to the statutory minimum of $20,000 per person and $40,000 per event.[3] Titan's complaint asserted that had Titan "been informed of the fact that Defendant Hyten's Michigan driver's license had been suspended, it never would have accepted the risk and would not have issued the subject insurance policy, unless Defendant Hyten had named himself [sic] as an excluded driver under MCL 500.3009." Farm Bureau, the insurance company for the Holmeses, intervened as a defendant in the

[3] The no-fault insurance act, MCL 500.3101 *et seq*., sets forth the amount of residual liability coverage required in Michigan no-fault automobile insurance policies. MCL 500.3131. MCL 500.3009(1) mandates that no-fault policies include coverage for "loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle" of "not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident, and to a limit of not less than $10,000.00 because of injury to or destruction of property of others in any accident."

action. Farm Bureau, Titan, and Hyten filed cross-motions for summary disposition under MCR 2.116(C)(10). In a written opinion and order, the circuit court denied Titan's motion and granted Farm Bureau's and Hyten's motions. The circuit court's opinion set forth the following pertinent factual findings:

> In this case, it is not clear that defendant McKinley Hyten knowingly committed any fraud. Indeed, the evidence does not even show that McKinley's mother [Johnson] committed any fraud. The evidence does not show what information the insurance agent received. However, whether a person has a driver's license is easily ascertained. There is no evidence before the Court as to whether the insurance agent asked to see McKinley's license or whether he may have taken her premium knowing that she did not have a license. For all of these reasons, the Court cannot conclude that the plaintiff has a right to reduce the coverage to the statutory minimums.

II. GOVERNING CASELAW

Titan challenges the circuit court's summary disposition ruling, which we review de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the

opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

The parties' dispute centers on whether Titan may reform Hyten's no-fault insurance policy by reducing the tort liability coverage available to the Holmeses from the stated policy limits of $100,000 per person and $300,000 per occurrence to the statutory minimums of $20,000 per person and $40,000 per occurrence. Titan argues that reformation is appropriate because Hyten fraudulently misrepresented that she possessed a driver's license on August 24, 2007.

The issue presented here lies within the intersection of three insurance concepts: policy cancellation, rescission, and reformation. Cancellation and rescission signify different methods for terminating insurance coverage.

> Rescission is a remedy distinct from cancellation. See 8B Appleman, Insurance Law and Practice, § 5011, p 403:
>
> "When a policy is cancelled, it is terminated as of the cancellation date and is effective up to such date; however, when a policy is rescinded, it is considered void ab initio and is considered never to have existed." [*United Security Ins Co v Ins Comm'r*, 133 Mich App 38, 42; 348 NW2d 34 (1984).]

In contrast, a policy in full effect may be reformed. "Reformation of an insurance policy is an equitable remedy." *Auto-Owners Ins Co v Elchuk*, 103 Mich App 542, 545; 303 NW2d 35 (1981). In *Najor v Wayne Nat'l Life Ins Co*, 23 Mich App 260, 272; 178 NW2d 504 (1970), this Court adopted the following description of reformation:

> "A written instrument may be reformed where it fails to express the intentions of the parties thereto as the result of accident, inadvertence, mistake, fraud, or inequitable conduct, or both fraud and mistake, fraud or inequitable conduct being on one side and mistake on the other.

> Conversely, in the absence of satisfactory proof of accident, fraud, or mistake, there is no basis for a court of equity to reform an instrument." 45 Am Jur, Reformation of Instruments, § 45, p 609.

Bearing in mind these basic concepts, we turn to the law governing Titan's ability to cancel, rescind, or reform Hyten's insurance policy under the circumstances presented.

> Where a policy of insurance is procured through the insured's intentional misrepresentation of a material fact in the application for insurance, and the person seeking to collect the no-fault benefits is the same person who procured the policy of insurance through fraud, an insurer may rescind an insurance policy and declare it void *ab initio*. [*Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985).]

However, the right to completely rescind a policy of no-fault insurance "ceases to exist once there is a claim involving an innocent third party." *Farmers Ins Exch v Anderson*, 206 Mich App 214, 218; 520 NW2d 686 (1994).[4] Once an insurable event occurs, "the liability of the insurer with respect to insurance required by the no-fault act becomes *absolute*." *Ohio Farmers Ins Co v Michigan Mut Ins Co*, 179 Mich App 355, 363; 445 NW2d 228 (1989).

In *Ohio Farmers*, 179 Mich App at 358, this Court addressed whether an insured's misrepresentation au-

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[4] Public policy forms the basis for this rule in Michigan. *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 171; 505 NW2d 895 (1993). "Generally, an automobile insurer cannot, on the ground of fraud or misrepresentation, retrospectively avoid coverage under a compulsory or financial responsibility insurance law so as to escape liability to a third party." 7 Am Jur 2d, Automobile Insurance, § 61, p 566. MCL 257.520(f)(1) also commands that "with respect to the insurance required by this chapter," an insurer's liability "shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs."

thorized an insurance company to reform the policy by limiting its liability to the statutory minimum excess coverage. *Ohio Farmers* arose from a claim made by an innocent third party injured in an accident with a vehicle insured by the plaintiff, Ohio Farmers Insurance Company. *Id*. at 357-358. After the accident, Ohio Farmers declared the policy void because it had been secured through misrepresentations. *Id*. at 357. In an unpublished opinion, this Court held that "as to . . . the injured innocent third party, Ohio Farmers insured the subject vehicle on the date of the accident." *Id.* at 358. The case returned to this Court after Ohio Farmers settled with the injured third party by paying him $50,300. *Id*. Ohio Farmers then sued the driver's insurer, Michigan Mutual Insurance Company, asserting that "if an insurer is forced for public policy reasons to afford coverage in situations where the policy could have been rescinded, the bodily injury liability limit should be $20,000, the minimum mandatory limit." *Id*. This Court disagreed, concluding "that basic public policy considerations require that, once an innocent third party is injured in an accident in which coverage is in effect on the automobile, an insurer will be estopped from asserting rescission as a basis upon which it may limit its liability to the statutory minimum." *Id*. at 364-365.[5]

In *Farmers Ins Exch*, 206 Mich App at 220, this Court announced that it "decline[d] to follow" *Ohio Farmers*, because that case neglected to take into account two portions of the financial responsibility act (FRA), MCL 257.501 *et seq*. MCL 257.520(f) states:

> Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

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[5] Although this Court stated that "an insurer will be estopped from asserting rescission as a basis" for limiting its liability, the insurance company actually sought to *reform* the policy to reflect lower coverage limits. *Ohio Farmers*, 179 Mich App at 358.

> (1) The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy, and except as hereinafter provided, no fraud, misrepresentation, assumption of liability or other act of the insured in obtaining or retaining such policy, or in adjusting a claim under such policy, and no failure of the insured to give any notice, forward any paper or otherwise cooperate with the insurance carrier, shall constitute a defense as against such judgment creditor.

MCL 257.520(g) contemplates:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

The first of the two provisions, MCL 257.520(f)(1), "prohibits an insurer from using fraud as a basis to void completely coverage under an insurance policy once an innocent third party has been injured." *Farmers Ins Exch*, 206 Mich App at 218. However, this provision deals only with "the statutorily mandated minimum coverage of $20,000/$40,000."[6] *Id*. at 218. "By contrast,

[6] The FRA contains the same minimum residual liability coverage limits as those in the no-fault act. The FRA mandates that all "motor vehicle liability polic[ies]" supply minimum coverage of $20,000 for injuries suffered by one person in an accident and $40,000 for injuries suffered by two or more people in an accident. MCL 257.520(a) and (b)(2).

[MCL 257.520(g)], which addresses excess coverage, does not include such a limitation." *Id*. Reading the two provisions together, this Court reasoned that "the Legislature did not intend to preclude an insurer from using fraud as a defense to void *optional* insurance coverage."[7] *Id*. at 219 (emphasis added). The Court further explained, "[B]y specifically exempting the excess or additional coverage permitted by [MCL 257.520(g)] from the remaining provisions of the chapter," the Legislature signaled that insurers remained free to rely on fraud as a defense to an excess coverage claim. *Id*.

After concluding that MCL 257.520(f)(1) and (g) generally permit insurers to interpose a fraud defense to claims for excess coverage, the Court in *Farmers Ins Exch* carved out a notable exception: "We think it unwise to permit an insurer to deny coverage on the basis of fraud after it has collected premiums, when it easily could have ascertained the fraud at the time the contract was formed . . . ." *Id*. at 219. Thus, a "validly imposed defense of fraud" will not "absolutely void any optional excess insurance coverage in all cases." *Id*. Rather, "when fraud is used as a defense in situations such as these, the critical issue necessarily becomes whether the fraud could have been ascertained easily by the insurer at the time the contract of insurance was entered into." *Id*.

In *Farmers Ins Exch*, this Court cited no authority for the proposition that an easily ascertainable fraud cannot support a denial of optional residual liability coverage for an innocent third party. See *id*. A case decided almost two decades earlier, *State Farm Mut*

[7] Optional coverage means "any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy." MCL 257.520(g).

Auto Ins Co v Kurylowicz, 67 Mich App 568; 242 NW2d 530 (1976), had reached the same result. In *Kurylowicz*, this Court held, " '[A]n automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy. This duty directly inures to the benefit of third persons injured by the insured.' " *Id*. at 576, quoting *Barrera v State Farm Mut Auto Ins Co*, 71 Cal 2d 659, 663; 79 Cal Rptr 106; 456 P2d 674 (1969). This Court explained as follows the rationale for this rule: " 'Such an injured (innocent third) party, who has obtained an unsatisfied judgment against the insured, may properly proceed against the insurer; *the insurer cannot then successfully defend upon the ground of its own failure reasonably to investigate the application*.' " *Kurylowicz*, 67 Mich App at 576, quoting *Barrera*, 71 Cal 2d at 663 (emphasis added).

The circuit court found that Titan's agent could have easily ascertained whether Hyten had a license: for example, by asking to see her driver's license. Titan has offered no evidence or argument to the contrary. Titan instead insists that more recent caselaw directly conflicts with *Farmers Ins Exch*, *Ohio Farmers*, and *Kurylowicz*. In the first case cited by Titan, *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 487; 563 NW2d 716 (1997), the plaintiff sought no-fault benefits from the defendant insurance company for injuries suffered in a motor vehicle accident that occurred while the plaintiff was driving his vehicle. The plaintiff's brother had purchased insurance from the defendant for the plaintiff's vehicle, but failed to list the plaintiff as a driver in the insurance application. *Id*. The plaintiff admitted that to save money, he allowed his brother to buy the insurance by misrepresenting the plaintiff's status as a driver. *Id*. at 488-489. This Court held that

the defendant was entitled to void the policy because the plaintiff did not qualify as an innocent third party and the plaintiff had defrauded the defendant by relying on his brother to obtain insurance for his vehicle instead of purchasing the insurance himself. *Id*. The Court further stated in dicta, "[A]n insurer does not owe a duty to the insured to investigate or verify that individual's representations or to discover intentional material misrepresentations." *Id*. at 489. Contrary to Titan's characterization of *Hammoud*, the Court's final observation merely reiterated the general rule that an insurer owes an *insured* no duty to investigate the insured's assertions in the insurance application. And, as Titan recognizes, binding caselaw in Michigan prevents an insurer from avoiding liability relating to the injuries of innocent third parties. In summary, *Hammoud* presents no basis for questioning the continuing vitality of *Farmers Ins Exch*, *Ohio Farmers*, or *Kurylowicz*.

Titan next invokes *Manier v MIC Gen Ins Co*, 281 Mich App 485; 760 NW2d 293 (2008), as a second example of this Court's retreat from the "easily ascertainable" rule. In *Manier*, we ruled that the defendant insurance company could not have "easily ascertained" that the insured party misrepresented that her son lived with her and that therefore "no duty of investigation compelled defendant to perform further research regarding [the son's] residence . . . ." *Id*. at 490. We reject that either *Hammoud* or *Manier* require abandonment of the "easily ascertainable" standard. Rather, a reading of these opinions reveals that they relied on and ratified the central holdings of *Farmers Ins Exch*, *Ohio Farmers*, and *Kurylowicz*.

In this case, the Holmeses qualify as innocent third parties, and the undisputed facts pertinent to Hyten's

misrepresentation demonstrate as a matter of law the readily ascertainable nature of Hyten's misrepresentation. As the circuit court pointed out, Titan could have requested a copy of Hyten's license or obtained her driving record. Because Titan could have easily ascertained Hyten's misrepresentation and because the coverage implicated benefits innocent third parties, Titan may not reform Hyten's policy to reduce the residual coverage to the statutory minimum limits. The circuit court correctly ruled that Hyten and Farm Bureau were entitled to judgment as a matter of law.

III. LEGAL UNDERPINNINGS OF THE "EASILY ASCERTAINABLE" RULE

Titan strenuously contends that this Court wrongly decided and continues to incorrectly rely on the caselaw adopting the "easily ascertainable" rule. In Titan's view, *Kurylowicz* and its progeny stand "on a very shaky legal foundation." Titan argues that the "easily ascertainable" standard constitutes a judicially created duty that should be overruled and discarded. Titan's arguments hold superficial appeal. At first blush, it may appear that this Court has indeed crafted a vehicle for evading or undermining the legislative intent embodied in MCL 257.520(f)(1) and (g). Consequently, we turn to a careful examination of the statutes that must guide our analysis and their application to the facts at hand.

A. STATUTORY FRAMEWORK

Indisputably, courts must construe an insurance policy in harmony with the statutes when possible. *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 359; 764 NW2d 304 (2009). Titan relies on portions of the FRA, but "[t]he no-fault act, as opposed to the financial responsibility act, is the most recent

expression of this state's public policy concerning motor vehicle liability insurance." *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225, 232; 531 NW2d 138 (1995).

In 1970, the Legislature amended MCL 500.3220, which limits the grounds on which an insurance company may cancel an automobile liability policy. 1970 PA 161. The preamendment version of MCL 500.3220 prohibited an automobile liability insurer from cancelling coverage after a policy had remained in effect for 55 days, except for any one of 12 enumerated reasons. The statute allowed an insurer to cancel a policy after 55 days if, for example, "during the 55 days following the date of original issue thereof the risk is unacceptable to the insurer," "the insured failed to disclose material information needed for the proper rating or acceptance of the risk," "the insured does not reside at the address specified in the policy and fails to furnish the correct address to the insurer within a reasonable period," or "the insured failed to disclose fully in his application this record of motor vehicle accidents or traffic violations as are material to the insurer's acceptance of the risk." MCL 500.3220(a), (c), (d), and (e), as added by 1966 PA 342. By amending MCL 500.3220 in 1970, the Legislature eliminated virtually all the specific reasons permitting cancellation beyond the 55-day window. The current version of MCL 500.3220 reads in its entirety:

> Subject to the following provisions no insurer licensed to write automobile liability coverage, after a policy has been in effect 55 days or if the policy is a renewal, effective immediately, shall cancel a policy of automobile liability insurance except for any 1 or more of the following reasons:
>
> (a) That during the 55 days following the date of original issue thereof the risk is unacceptable to the insurer.

> (b) That the named insured or any other operator, either resident of the same household or who customarily operates an automobile insured under the policy has had his operator's license suspended during the policy period and the revocation or suspension has become final.

We read the current version of MCL 500.3220 *in pari materia* with the no-fault act, which the Legislature enacted in 1972. MCL 500.3101 *et seq*., as added by 1972 PA 294. Both statutes express the state's policy of protecting "a source and a means of recovery" for automobile accident victims. *Kurylowicz*, 67 Mich App at 574. Both statutes also generate "significant incentive towards the goal of insurance coverage for all automobiles." *McKendrick v Petrucci*, 71 Mich App 200, 207; 247 NW2d 349 (1976). In decreeing no-fault insurance compulsory for all motorists, the Legislature contemporaneously undertook to highly regulate the business of insurance companies offering no-fault insurance policies in this state. "The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). "In effect, insurance companies [offering no-fault coverage] are the instruments through which the Legislature carries out a scheme of general welfare." *Id*. at 597.

Keeping in mind the legislative purposes animating the no-fault act's comprehensive statutory scheme, we next consider the reasons for circumscribing the policy-cancellation period. At present, MCL 500.3220(a) contemplates that no-fault insurers may cancel coverage within 55 days of a policy's issuance if "the risk is unacceptable to the insurer." Alternatively phrased, an insurer may make its own risk assessment, without statutorily imposed restrictions. However, the Legislature limited to 55 days the period in which an insurer

can make its risk assessment. We conclude that MCL 500.3220(a) evidences the intent to afford no-fault insurers a definite window of time in which to investigate an insured for the purpose of assessing risk. Stated differently, MCL 500.3220(a) envisions that no-fault insurers will either perform an investigation to determine whether to accept a new risk or forfeit the opportunity to later decide that an insured's driving record or other characteristic should require cancellation of the policy. By limiting the period for policy cancellation to a certain end date, the statute promotes the goal of assured and adequate coverage embodied in the no-fault act. That said, we agree with Titan that no Michigan statute directly imposes on an insurance company the *duty* to investigate the representations of an insured. However, MCL 500.3220 does express that if an insurer opts against undertaking an early investigation, it may not use later-acquired information to terminate its policy obligations except under very limited circumstances. MCL 500.3220(b).

B. MISREPRESENTATION AND REASONABLE RELIANCE

In *Kurylowicz*, 67 Mich App at 570, the defendant misrepresented that he had no previous license suspensions. After an accident that killed one motorist and injured five others, State Farm rescinded the policy and later brought a declaratory judgment action seeking a determination of the rights of the injured parties under the policy. *Id*. In lieu of deciding whether State Farm had properly declared the policy void *ab initio*, this Court elected to address whether State Farm had "reasonably relied on the representations of the insured so as to justify a holding that the policy was procured by fraud." *Id*. at 574. The Court concluded that "where an automobile liability insurer retains premiums, notwith-

standing grounds for cancellation reasonably discoverable by the insurer within the 55-day statutory period as prescribed by [MCL 500.3220], the insurer will be estopped to assert that ground for rescission thereafter." *Id*. at 579.

The "reasonable reliance" standard advanced in *Kurylowicz* derived from the common law of fraud. To establish a prima facie fraud claim, a plaintiff must show that it acted in reliance on the defendant's material misrepresentation. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 38-39; 761 NW2d 151 (2008). "This Court has frequently reiterated that, to sustain a fraud claim, the party claiming fraud must *reasonably* rely on the material misrepresentation." *Id*. at 39. "Reasonable reliance also must exist to support claims of innocent misrepresentation." *Id*. "A misrepresentation claim requires reasonable reliance on a false representation. There can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994) (citation omitted). Thus, proof of misrepresentation demands that the injured party establish justifiable reliance on misleading or false statements.

C. EASILY ASCERTAINABLE MISREPRESENTATIONS AND POLICY REFORMATION

Titan submits that on August 24, 2007, Hyten misrepresented that she was an eligible purchaser of no-fault automobile insurance under MCL 500.2103(1). Titan further asserts that it issued an insurance policy to Hyten in reliance on her misrepresentation that she possessed a valid driver's license on August 24, 2007. In Titan's estimation, Hyten's misrepresentation entitles Titan to reform the policy by reducing the liability limits to the statutorily prescribed minimums. Titan's

position ignores whether its reliance qualified as reasonable, particularly in light of MCL 500.3220. Titan undisputedly had awareness of the 55-day deadline for determining whether to accept a new risk. The plain language of MCL 500.3220 also placed Titan on notice that after the passage of 55 days, it lost the ability to cancel a policy, even if later-acquired information brought to light a material misrepresentation. Titan apparently decided not to investigate the risk it undertook by insuring Hyten. Given this election, and the easily ascertainable nature of Hyten's unlicensed status, Titan has not shown that it *reasonably* relied on Hyten's misrepresentation when it neglected to cancel her policy within 55 days of its issuance.

Actions to reform or rescind a contract sound in equity. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 587; 458 NW2d 659 (1990); *Van Etten v Mfr Nat'l Bank of Detroit*, 119 Mich App 277, 282-283; 326 NW2d 479 (1982). The law governing innocent misrepresentation, the concept at the heart of this case, also derives from and rests on equitable principles:

> The defenses of innocent misrepresentation and silent fraud are not based in law but in equity. The equitable court awarding a remedy must look to the most just result. Therefore, should the court on remand find there was innocent misrepresentation or silent fraud it must decide which remedy would be the most equitable under the unique circumstances of the case. The court is not confined to the polar opposite remedies urged by the opposing parties: full enforcement or total abrogation of the indemnity agreement. Other remedies, such as reformation, restitution, or partial enforcement of the contract, may be examined. [*United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 134; 313 NW2d 77 (1981).]

In effect, Titan seeks the benefit of an equitable ruling that it may avoid liability to innocent third

parties on the basis of Hyten's misrepresentation, notwithstanding its deliberate election to forgo a risk assessment. "[E]quity aids the vigilant, not those who sleep on their rights." *Farley v Carp*, 287 Mich App 1, 7; 782 NW2d 508 (2010) (quotation marks and citations omitted). Alternatively stated, "equity will not lend its aid to those who are not diligent in protecting their own rights." *Burlage v Radio Cab Co*, 321 Mich 319, 325; 32 NW2d 465 (1948). Permitting Titan to avoid the consequences of its conscious decision to forgo investigation of Hyten's insurability would contradict the no-fault act's purpose of assured, adequate compensation and thwart the purpose reflected in MCL 500.3220. Simply put, Titan's reliance on Hyten's representations cannot qualify as reasonable in light of the public policy expressed in the no-fault act and MCL 500.3220. Far from conflicting with Michigan's statutory no-fault insurance framework, the "easily ascertainable" standard fosters statutory objectives and comports with basic equitable principles. Accordingly, we respectfully decline Titan's invitation to overrule *Kurylowicz* and its progeny.

IV. HYTEN'S CURE OF THE MISREPRESENTATION

Under the circumstances presented here, a second legal basis exists for denying Titan's request to reform the policy. We recognize that the circuit court did not consider any alternative rationale for its holding; given the firm establishment of the "easily ascertainable" standard, neither party raised additional legal arguments. But because Titan has questioned the legal foundation for granting summary disposition in Hyten's favor, we consider a related legal question regarding which the facts necessary for resolution ap-

pear in the record. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

Titan asserts that on the date Hyten signed the insurance application, she misrepresented that she would have her license by August 24, 2007. Because Hyten's subsequent acquisition of her license cured this earlier misrepresentation, we reject Titan's argument. Titan does not dispute that on September 20, 2007, the state restored Hyten's license and she became eligible to purchase no-fault insurance. Nor does Titan suggest that it would have refused to sell Hyten insurance, or charged her an increased premium, on the basis of either her driving record or her failure to obtain her license on August 24, 2007.[8] In the circuit court, Titan submitted an affidavit signed by Beverly Barrows, the manager of Titan's underwriting department. Barrows attested that Titan would not have issued coverage to an unlicensed driver. However, the affidavit noticeably omits any averment that Titan would have refused to insure Hyten on September 20, 2007, or would have differently rated her risk. Because Titan cannot substantiate that it endured any harm occasioned by the August 2007 innocent misrepresentation, it is not entitled to equitable relief.

The Second Restatement of Contracts supplies the legal principle that should dictate the outcome of this case:

> § 165. Cure by Change of Circumstances
>
> If a contract is voidable because of a misrepresentation and, before notice of an intention to avoid the contract, the facts come into accord with the assertion, the contract is no

[8] Because Titan deliberately opted against performing any investigation of Hyten's insurability, it cannot now claim that it would have cancelled the policy within 55 days had it known of Hyten's driving record.

> longer voidable unless the recipient has been harmed by relying on the misrepresentation. [1 Restatement Contracts, 2d, § 165, pp 448-449.]

The comment to this section elaborates as follows:

> *a. Rationale.* In general, the recipient of a misrepresentation need not show that he has actually been harmed by relying on it in order to avoid the contract. If, however, the effect of misrepresentation has been cured because the facts have been brought or have otherwise come into accord with the assertion before he has notified the maker of his intention to avoid the contract, there is ordinarily little likelihood of harm. The rule stated in this Section precludes avoidance in such a case, unless the recipient shows that he has actually been harmed. It applies to fraudulent as well as to non-fraudulent misrepresentations. [*Id.* at 449.][9]

Once Hyten received her license, the prior innocent misrepresentation lost its effectiveness as a potential ground for contract cancellation. Because no evidence of record refutes that Titan would have insured Hyten on September 20, 2007, and Hyten cured her unlicensed status approximately five months before the accident, we hold that Titan has failed to demonstrate an equitable basis for rescission or reformation of the contract.

V. STANDING

Finally, Titan urges that the circuit court erred by finding that Farm Bureau had standing to challenge Titan's attempt to reform the insurance contract. We consider de novo the legal question whether a party has

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[9] "Although there is little authority in support, it is undoubtedly true that where the facts subsequently become in accord with an innocent misrepresentation prior to rescission, the right to rescind is lost." 27 Williston, Contracts (4th ed), § 69:49, p 116. We have not located any published authority opposed to the proposition, either.

standing. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008). To have standing, a party must possess "some real interest in the cause of action" or "the subject matter of the controversy." *MOSES, Inc v Southeast Mich Council of Gov'ts*, 270 Mich App 401, 414; 716 NW2d 278 (2006) (quotation marks and citations omitted). A party need not share privity of contract to have standing in a declaratory judgment action concerning a question of coverage under an insurance policy as long as the declaratory judgment might affect the party's rights. *Allstate Ins Co v Hayes*, 442 Mich 56, 63; 499 NW2d 743 (1993).

Farm Bureau was not in privity of contract with either Titan or Hyten, but if the circuit court had reformed Titan's insurance contract with Hyten, then Farm Bureau as the insurance company for the innocent third parties (the Holmeses) might have had to cover the costs of their injuries. Consequently, Farm Bureau had a real interest in the outcome of the litigation, and the circuit court correctly determined that Farm Bureau had standing.

Affirmed.

K. F. KELLY, J., concurred with GLEICHER, P.J.

ZAHRA, J., did not participate.

PEOPLE v BARBARICH

Docket No. 290772. Submitted September 13, 2010, at Detroit. Decided February 1, 2011, at 9:15 a.m.

Shaun D. Barbarich was charged with operating a motor vehicle while intoxicated, MCL 257.625, after the driver behind him in traffic made eye contact with a police officer in the next lane, pointed to defendant's car, and mouthed the words "almost hit me" through her closed window. On this basis, the officer stopped defendant's vehicle and discovered that defendant was intoxicated. Defendant moved to suppress the evidence of his intoxication and dismiss the charge on the ground that the informant's tip had not provided the officer with the reasonable suspicion required to stop defendant's vehicle under the protections against unreasonable searches and seizures guaranteed by the Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11. The 28th District Court, James A. Kandrevas, J., denied the motion and, on defendant's appeal, the Wayne Circuit Court, James A. Callahan, J., reversed and dismissed the charge. The Court of Appeals denied the prosecution's application for leave to appeal. The prosecution applied for leave to appeal in the Supreme Court, which, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 485 Mich 1059 (2010).

The Court of Appeals *held*:

Under the totality of the circumstances, the unnamed informant's contemporaneous face-to-face tip to a police officer about defendant's erratic driving provided the reasonable suspicion necessary to justify the investigative stop of defendant's moving vehicle. Because the public's interest in safety of the roadways is high compared to the minimally invasive nature of the investigation, fewer foundational facts are necessary to justify an investigative stop of a moving vehicle than a stop and frisk for a concealed weapon or contraband. While the quantity of information in a citizen's tip about erratic driving must be sufficient to identify the vehicle and to support an inference of a traffic violation, a tip is sufficiently reliable if law enforcement corroborates its innocent details. The circuit court erred by dismissing the charge.

Reversed and remanded for further proceedings.

GLEICHER, J., dissenting, would have held that a warrantless stop based on an uncorroborated tip from an unidentifiable source that lacks detail and suggests only an ordinary traffic infraction violates the Fourth Amendment.

SEARCHES AND SEIZURES — AUTOMOBILES — INVESTIGATIVE STOPS — REASONABLE SUSPICION — INFORMANTS.

An unnamed informant's contemporaneous face-to-face tip to the police about erratic driving may be sufficient to justify an investigative stop of the driver's moving vehicle under the totality of the circumstances; the tip must identify the vehicle, support an inference of a traffic violation, and be corroborated in its innocent details by the police (US Const, Am IV; Const 1963, art 1, § 11).

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Lori Baughman Palmer*, Assistant Prosecuting Attorney, for the people.

Boulahanis & Associates, P.C. (by *Gregory J. Boulahanis*), for defendant.

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

K. F. KELLY, J. This prosecutor's appeal requires us to decide what amount of information supplied by an unnamed citizen, who provides a face-to-face contemporaneous tip about potentially dangerous or erratic driving, is sufficient to justify an investigative stop of a moving vehicle. On defendant's motion to suppress evidence, the circuit court dismissed defendant's charge of operating a motor vehicle while intoxicated, MCL 257.625, on the ground that the police officer lacked a reasonable articulable suspicion that defendant was involved in criminal activity. We disagree and reverse.

I. BASIC FACTS

On March 17, 2008, defendant was issued a citation

for driving while intoxicated. Defendant moved to suppress the evidence of his intoxication and dismiss the charge on the basis that the stop of his vehicle was unreasonable and unconstitutional.

The district court held an evidentiary hearing on July 11, 2008. The only witness to testify was Michigan State Trooper Christopher Bommarito, who had stopped defendant's vehicle and issued defendant the citation. Bommarito testified that on the evening of March 17, 2008, which was Saint Patrick's Day, he was on regular patrol, driving a fully marked police car. As part of his assignment that evening, he was conducting a property inspection at a bar called Malarkey's. Bommarito indicated that the bar's parking lot was full of patrons, a "big party tent" was set up in the parking lot, and he was there to look for problems, such as people urinating outside. After his inspection, Bommarito left the Malarkey's parking lot and headed south on Dix Road. Immediately after leaving the parking lot, a red pickup truck passed Bommarito's vehicle, heading northbound on Dix Road. Another vehicle, defendant's, was traveling in front of the red pickup. As Bommarito passed the red pickup, the driver of that vehicle made eye contact with Bommarito, pointed directly to defendant's vehicle in front of her, and mouthed the words "almost hit me." Bommarito immediately made a U-turn, turned on his emergency lights and siren, and followed defendant's vehicle into the Malarkey's parking lot. Bommarito approached defendant's vehicle and discovered that defendant was intoxicated. During the evidentiary hearing, Bommarito admitted that he had made no attempt to speak to the woman in the red pickup before stopping defendant and that he had not personally observed defendant driving in a manner that would have justified a stop. In other words, Bommarito stopped defendant's vehicle solely on the basis of the

woman's action of pointing to defendant's vehicle and mouthing the words "almost hit me."

The district court denied without explanation defendant's motion to suppress. Before the matter could proceed to trial, defendant appealed the district court's decision in the circuit court, arguing that Bommarito lacked a reasonable suspicion to stop his vehicle. The circuit court reversed on the basis that Bommarito had no reasonable, articulable suspicion that a crime was afoot, but merely had a hunch, and therefore the stop violated defendant's Fourth Amendment rights. It dismissed the charge against defendant.

Plaintiff then filed for leave to appeal in this Court. Initially, this Court denied leave to appeal, *People v Barbarich*, unpublished order of the Court of Appeals, entered June 3, 2009 (Docket No. 290772), and the matter was appealed in our Supreme Court. In lieu of granting leave to appeal, the Court remanded the case to this Court "for consideration as on leave granted." *People v Barbarich*, 485 Mich 1059 (2010). We now consider whether the circuit court erred by granting defendant's motion to suppress.

II. STANDARD OF REVIEW

We review de novo the circuit court's ultimate ruling on a motion to suppress evidence. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). However, we review its factual findings for clear error. *Id*. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008) (citation and quotation marks omitted). "We overstep our review function if we substitute our judgment for that of the trial court and make independent findings."

People v Bolduc, 263 Mich App 430, 436; 688 NW2d 316 (2004) (citation and quotation marks omitted).

III. GENERALLY APPLICABLE LAW

The Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution protect against *unreasonable* searches and seizures.[1] Generally, searches or seizures conducted without a warrant are presumptively unreasonable and, therefore, unconstitutional. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). This does not mean that all searches and seizures conducted without a warrant are forbidden; only those that are unreasonable. The United States Supreme Court has carved out numerous exceptions to the general rule that warrantless searches are unreasonable using a test that "balances the governmental interest that justifies the intrusion against an individual's right to be free of arbitrary police interference." *People v Faucett*, 442 Mich 153, 158; 499 NW2d 764 (1993). Thus, the higher the governmental interest, the more likely a warrantless search or seizure is to be reasonable, especially if the implicated individual interest is low.

As subjective as this test may be, several categories of permissible warrantless searches and seizures are well established in Fourth Amendment jurisprudence, including "exigent circumstance, searches incident to a lawful arrest, stop and frisk, consent, and plain view."

[1] The Michigan Constitution is construed to provide the same protection as that provided by the Fourth Amendment absent a compelling reason to do otherwise. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999). And "[w]ith regard to the issue whether an anonymous tip supports a reasonable suspicion to stop a suspect, Michigan case law tracks federal precedent." *People v Faucett*, 442 Mich 153, 163; 499 NW2d 764 (1993).

People v Brzezinski, 243 Mich App 431, 433; 622 NW2d 528 (2000), citing *In re Forfeiture of $176,598*, 443 Mich 261, 265; 505 NW2d 201 (1993), and *People v Jordan*, 187 Mich App 582, 586; 468 NW2d 294 (1991). Each of these exceptions, however, still requires reasonableness and probable cause. *Brzezinski*, 243 Mich App at 433 While each of these categories of searches and seizures has been deemed reasonable after a balancing of the relevant interests, the ultimate determination whether a particular search is reasonable is fact-intensive and must be measured by examining the total circumstances of each case. See *Mullen*, 282 Mich App at 21. Generally, if evidence is seized in violation of the constitutional prohibition against unreasonable searches and seizures, it must be excluded from trial. *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009).

The only exception applicable in the present case is the investigative stop, also known as a *Terry* stop. *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Under this doctrine, if a police officer has a reasonable, articulable suspicion to believe a person has committed or is committing a crime given the totality of the circumstances, the officer may briefly stop that person for further investigation. *People v Christie (On Remand)*, 206 Mich App 304, 308; 520 NW2d 647 (1994), citing *Terry*. Moreover, under *Terry*, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even if probable cause does not exist to arrest the person. *Terry*, 392 US at 22; *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). The scope of any search or seizure must be limited to that which is necessary to quickly confirm or dispel the officer's suspicion. *People v Yeoman*, 218 Mich App 406, 411; 554 NW2d 577 (1996).

When a court is called upon to determine whether a defendant's Fourth Amendment rights have been violated in the context of a *Terry* stop, it should view the totality of the circumstances in light of commonsense judgments and inferences about human behavior, *People v Horton*, 283 Mich App 105, 109; 767 NW2d 672 (2009), and should be careful not to apply overly technical reviews of a police officer's assessment of whether criminal activity is afoot, *Faucett*, 442 Mich at 168. Further, when the circumstances involve an informant's tip, courts must examine whether the tipster's information contained sufficient indicia of reliability to provide law enforcement with a reasonable suspicion that would justify the stop. *Faucett*, 442 Mich at 168. To assess the reliability of a tip, the Michigan Supreme Court has mandated that courts consider, given the totality of the circumstances, "(1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors." *People v Tooks*, 403 Mich 568, 577; 271 NW2d 503 (1978).

A. FEDERAL JURISPRUDENCE: *UNITED STATES v WHEAT*

No precedentially binding Michigan case has addressed the exact factual situation before this Court, i.e., an investigative stop of a moving automobile based solely on a citizen informant's face-to-face tip about driving that potentially poses a danger to persons or property. However, the United States Court of Appeals for the Eight Circuit has considered a factual situation similar to the one at issue. In *United States v Wheat*, 278 F3d 722, 724 (CA 8, 2001), a citizen driving on the highway called 911 and reported that a tan Nissan with a license plate beginning with W-O-C was being driven erratically in the northbound lane of the highway.

Officers stopped the vehicle shortly thereafter, without having first observed any erratic driving. *Id.* at 724-725.

After extensively reviewing caselaw on the matter, the court determined that the amount of information necessary to justify an investigative stop based on an anonymous tipster's report of erratic driving is less than that required for other types of criminal activity that pose less immediate danger. *Id*. at 729-730, 733-734. The court indicated that a tip can provide reasonable suspicion for a stop if "the anonymous tipster . . . provide[s] a sufficient quantity of information" and that the quality, or reliability, of the information conveyed need only be corroborated in its innocent details. *Id*. at 731, 735. With regard to the former, the quantity of information must include sufficient detail to ensure that the car identified by the police is the same as the one identified by the informant, and may include such information as "the make and model of the vehicle, its license plate numbers, its location and bearing, and similar innocent details . . . ." *Id*. at 731. The information must also "support an inference that the tipster has witnessed an actual traffic violation that compels an immediate stop." *Id*. at 732. The court reasoned that less is required with regard to predictive elements of reliability because of the imminent danger that erratic, and possibly drunk, driving poses and because of the tipster's obvious basis of knowledge, i.e., firsthand contemporaneous observations. *Id*. at 734-737.

Applying this test to the circumstances before it, the court ruled that reasonable articulable suspicion justified the officer's investigative stop:

> An anonymous caller provided an extensive description of a vehicle that, based on his contemporaneous eyewitness

> observations, he believed was being operated dangerously, and cited specific examples of moving violations. When Officer Samuelson caught up with the vehicle minutes later while it was stopped at an intersection, he corroborated all its innocent details, confirming that it was the one identified by the tipster. Within seconds after the vehicle resumed motion, Officer Samuelson effected an immediate investigatory stop, rather than allow it to proceed and potentially endanger other vehicles. Under the totality of the circumstances, he had reasonable suspicion to do so, and the stop was valid under the Fourth and Fourteenth Amendments. [*Id.* at 737.]

B. MICHIGAN LAW: INVESTIGATIVE STOPS OF MOVING VEHICLES BASED ON CITIZENS' TIPS ABOUT ERRATIC DRIVING

While no Michigan case has applied the less rigorous test adopted in *Wheat*, this Court addressed a similar factual situation involving a tip about an automobile accident in *People v Estabrooks*, 175 Mich App 532; 438 NW2d 327 (1989),[2] which predated *Wheat*. The *Estabrooks* Court applied *Tooks*, 403 Mich at 577, to conclude that a citizen informant's tip gave the officer a sufficient suspicion that criminal activity had occurred to justify her investigative stop of the defendant. *Estabrooks*, 175 Mich App at 536-537. In *Estabrooks*, the officer was investigating the scene of an accident when a citizen approached the officer and indicated that defendant's vehicle, a Lincoln Continental, had rear-ended his motorcycle multiple times. *Id*. at 534. The citizen pointed to the defendant's vehicle, which was stopped in nearby traffic. *Id*. The Court held that it was reasonable for the officer to suspect on the basis of the informant's tip that an accident might have occurred. *Id*. at 537. The Court stated:

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[2] Published cases issued before November 1, 1990, are not precedentially binding on this Court, although they may be persuasive authority. MCR 7.215(J)(1).

> [T]he fact that the motorcyclist was actually present and accusing defendant immediately after the rear-endings indicated reliability on the part of the informant. Second, the fact that the informant actually pointed out defendant's car to Officer Summers provided her with precise and easily verifiable information, which also indicated that the information was reliable. [*Id*. at 536-537.]

The Court rejected the defendant's argument that, because the informant had indicated no criminal activity, the police officer could not have stopped the defendant without some personal observation of the traffic violation. The Court reasoned that, on the basis of the information provided, the officer could have reasonably concluded that a crime had occurred, including leaving the scene of a motor vehicle accident, felonious assault, or operating under the influence of liquor (OUIL). *Id*. at 538. The Court noted, "It is not vital that [the officer] knew exactly what crime was being committed or would be charged when [the officer] decided to stop defendant, only that the circumstances justified the stop." *Id*. at 538-539. Consequently, this Court reversed the circuit court's order that had dismissed the defendant's OUIL conviction. *Id*. at 539.

Although *Estabrooks* applied *Tooks* to conclude that the tip contained sufficient indicia of reliability to justify the stop, the rule in *Tooks* was adopted in a different context and does not adequately take into account the relevant interests that must be balanced in determining whether a vehicle stop based on a citizen's tip about erratic driving is reasonable. In *Tooks*, an in-person anonymous tipster who was on foot informed the police that he had seen the defendant show a gun to two other men. *Tooks*, 403 Mich at 573-574, 583 (KAVANAGH, C.J., dissenting). The Court concluded that the information provided to the police, including a detailed physical description of the defendant and his companions, justified

the stop and subsequent search. *Id*. at 574-575. In reaching this conclusion, the Court recognized the strong interest in police safety, which presented a stronger case justifying a stop and frisk, especially in combination with the tip's detail, than if the tip had involved narcotics or other contraband. *Id*. at 581-582. Accordingly, the interest at stake in *Tooks*, police safety, is different from the interest at issue in the present matter.

The exigency here, and the one that existed in *Estabrooks*, is heightened in comparison to a tip informing a police officer of a concealed weapon or other clandestine contraband. In the latter instance, the police have the opportunity to observe the suspect from afar to possibly confirm or dispel any suspicions or to corroborate the tip and may have the opportunity to initiate a consensual encounter. In other words, the threat of imminent danger is not necessarily as high as in the present case, in which an erratic driver threatened the lives of fellow drivers. See *Wheat*, 278 F3d at 736-737. In contradistinction,

> where an anonymous tip alleges erratic and possibly drunk driving, a responding officer faces a stark choice. . . . [H]e can intercept the vehicle immediately and ascertain whether its driver is operating under the influence of drugs or alcohol. Or he can follow and observe, with three possible outcomes: the suspect drives without incident for several miles; the suspect drifts harmlessly onto the shoulder, providing corroboration of the tip and probable cause for an arrest; or the suspect veers into oncoming traffic, or fails to stop at a light, or otherwise causes a sudden and potentially devastating accident. [*Id.* (citation omitted).]

See also *Christie*, 206 Mich App at 309 (recognizing that erratic driving often indicates an intoxicated driver).

The *Estabrooks* Court did not explicitly recognize the heightened interest at stake. Indeed, there was no need for it to do so because the exact question that is now

before this Court was not at issue in *Estabrooks*. Rather, as noted, the defendant in *Estabrooks* simply argued that the informant had to provide information pertaining to a specific crime, not merely a traffic violation. Thus, while we do not disagree with the outcome in *Estabrooks* or its analysis, we must make clear that less information is required from citizen informants reporting contemporaneous incidents of erratic or potentially dangerous driving to justify an investigative stop than a strict application of *Tooks* would suggest. The *Estabrooks* Court appears to have implicitly recognized this principle, but did not articulate it, in holding that an investigative stop may be justified on the totality of the circumstances even if the informant's tip did not designate a crime.

Certainly, the courts of this state have already recognized, albeit not in cases involving citizen tips, that fewer foundational facts are necessary to justify a stop of a moving vehicle than would be required to search a home or to either stop or search that same vehicle. *People v Whalen*, 390 Mich 672, 682; 213 NW2d 116 (1973); *Faucett*, 442 Mich at 164 n 11 (noting that *Whalen* "set[s] forth the reasonableness standard for all automobile searches, including those based on informants' tips, using the totality of the circumstances test"); *Christie*, 206 Mich App at 308-309. As noted, such investigative stops of automobiles have been deemed reasonable on the basis of less information because the public's interest in safety of the roadways is high compared to the minimally invasive nature of the investigation. Accordingly, we hold, consistently with *Whalen* and *Wheat*, that fewer foundational facts are necessary to justify an investigative stop of a moving vehicle based on a citizen's tip about erratic driving. Specifically, like in *Wheat*, while the quantity of the tip's information must be sufficient to identify the vehicle

and to support an inference of a traffic violation, less is required with regard to a tip's reliability; as to the latter, it will suffice if law enforcement corroborates the tip's innocent details.

IV. ANALYSIS

In this case, on Saint Patrick's Day in 2008, a citizen was driving north on Dix Road, and she passed Trooper Bommarito, who had just left the parking lot of Malarkey's and was driving south on Dix Road. As she passed, she made eye contact with Bommarito, pointed to defendant's vehicle directly in front of her, and mouthed the words "almost hit me." Bommarito immediately made a U-turn, turned on his siren and emergency lights, and followed defendant's vehicle into the parking lot of Malarkey's. He did not observe defendant drive in an erratic manner.

The woman's action of pointing to the vehicle in front of her was sufficient to accurately identify defendant's vehicle and provided precise and verifiable information to the officer, which also strongly suggests that the information was reliable. The basis of the informant's knowledge was obvious—it can be inferred from her statement, "Almost hit me," and her action of pointing to the vehicle traveling immediately in front of her that defendant's vehicle had recently almost come into contact with the woman's vehicle; her tip was clearly based on firsthand and contemporaneous observations, which further confirms the veracity of the information. Moreover, had Bommarito wished to obtain the informant's personal information he could have, by looking up her license plate number. Accordingly, the fact that the tipster was actually face to face with Bommarito when she relayed the tip, and thus likely knew that she could be subject to police question-

ing, further indicates that she was credible and that the information she provided was reliable. In addition, her statement, "Almost hit me," was sufficient to support an inference that an actual traffic violation had occurred. While it is true that the statement could be consistent with legal behavior, it was also enough to create an inference that defendant had been driving erratically in contravention of MCL 257.626 (reckless driving, a misdemeanor), MCL 257.626b (careless or negligent operation of a motor vehicle, a civil infraction), or MCL 257.625 (operating a motor vehicle while intoxicated). See also *Christie*, 206 Mich App at 309 (acknowledging that "erratic driving can give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop by a police officer"). "It is not vital that [the officer] knew exactly what crime was being committed or would be charged when [the officer] decided to stop defendant, only that the circumstances justified the stop." *Estabrooks*, 175 Mich App at 538-539. The circumstances here, together with the citizen's statement, certainly justified the stop. Bommarito was on regular patrol and had just finished a property inspection at the bar and surrounding area. The purpose of the inspection was to look for potential problems such as people urinating in public. As previously noted, it was St. Patrick's Day, the parking lot was full of patrons, and a large party tent had been set up.

Certainly more facts could have strengthened the officer's suspicion, but in cases involving tips of erratic driving of a motor vehicle, fewer facts are necessary to justify an investigative stop. *Wheat*, F3d at 730-737; *Whalen*, 390 Mich at 682. "[T]he Fourth Amendment does not require a policeman to simply shrug his shoulders and allow a crime to occur or a criminal escape." *Whalen*, 390 Mich at 682. Had the officer waited to personally observe defendant engage in dan-

gerous and erratic driving, his suspicion would have surpassed a reasonable, articulable suspicion and become probable cause to seize defendant and issue an appropriate citation. "Thus, police would lose the intermediate step of investigatory stops based on reasonable suspicion." *Wheat*, 278 F3d at 733. In this case, sufficient indicia of reliability supported the citizen's tip, and Bommarito was justified in conducting the investigative stop. The tip provided sufficient information to accurately identify the vehicle and create an inference that a crime or civil infraction had occurred, and the tip was also sufficiently reliable, being based on the woman's contemporaneous observations. Under the totality of the circumstances, Bommarito had a reasonable, articulable suspicion that justified an investigative stop of defendant's vehicle. The circuit court erred by concluding otherwise.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

ZAHRA, J., concurred.

GLEICHER, P.J. (*dissenting*). Today the majority empowers private citizens to select certain motorists for warrantless searches and seizures conducted by police officers lacking probable cause or any reasonable suspicion of criminal conduct. Because the Fourth Amendment prohibits seizures premised on accusations utterly devoid of objective or specific facts, I respectfully dissent.

Michigan State Police Officer Christopher Bommarito testified that he initiated a traffic stop of defendant Shaun Barbarich's truck immediately after a woman driving a red pickup truck pointed to Barbarich's vehicle and mouthed the words "almost hit me."

Bommarito recalled that he probably read the woman's lips because the windows of her vehicle and his were likely closed. Bommarito admitted that he possessed no other facts or information about the woman or Barbarich when he decided to make the stop:

> *Q*. And so at the time that she mouthed that, did—when did you turn on your overheads?
>
> *A*. I immediately turned my patrol car around and turned my emergency lights and sirens on to initiate a stop on that vehicle.
>
> *Q*. Okay. So, at that point-in-time, when you saw what you thought was her mouthing that he almost hit me, you immediately decided at that point-in-time to stop Mr. Barbarich?
>
> *A*. Correct.

Bommarito acknowledged that he made no attempt to look for the driver of the red pickup truck and could provide no information about her.

The majority concludes, "The woman's action of pointing to the vehicle in front of her was sufficient to accurately identify defendant's vehicle and provided precise and verifiable information to the officer, which also strongly suggests that the information was reliable." *Ante* at 480. According to the majority, "[T]he fact that the tipster was actually face to face with Bommarito when she relayed the tip, and thus likely knew that she could be subject to police questioning, further indicates that she was credible and that the information she provided was reliable." *Ante* at 480-481. In reaching these conclusions, the majority substantially relies on a decision of the United States Court of Appeals for the Eighth Circuit, *United States v Wheat*, 278 F3d 722 (CA 8, 2001). I respectfully disagree that the information available to Bommarito qualified as "precise and verifiable" and that it supplied a rea-

sonable basis for stopping defendant and his vehicle. Furthermore, I believe that *Wheat* may be readily distinguished from the facts presented here.

The protections afforded by the Fourth Amendment "extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v Arvizu*, 534 US 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002). In *Terry v Ohio*, 392 US 1, 21; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court explained that "specific and articulable facts" must exist to justify an intrusion on the constitutionally protected interests of a private citizen. "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v Cortez*, 449 US 411, 417; 101 S Ct 690; 66 L Ed 2d 621 (1981). These Supreme Court cases, and innumerable others, instruct that the Fourth Amendment tempers a police officer's power to detain a motorist by measuring the appropriateness of a warrantless seizure against an objective standard that demands particularized evidence of lawbreaking.

To satisfy the Fourth Amendment's objective standard, a police officer must be able to articulate more than "an 'inchoate and unparticularized suspicion or "hunch" of criminal activity.' " *Illinois v Wardlow*, 528 US 119, 123-124; 120 S Ct 673; 145 L Ed 2d 570 (2000), quoting *Terry*, 392 US at 27. Indisputably, an informant's tip may supply reasonable suspicion that a crime has been or is about to be committed. In *Adams v Williams*, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972), the United States Supreme Court "extended the *Terry* stop and frisk rationale to situations in which the stop and frisk was prompted by an unverified tip from an informant." *People v Tooks*, 403 Mich 568, 576; 271

NW2d 503 (1978). The informant in *Adams* "was known to [the officer] personally and had provided him with information in the past." *Adams*, 407 US at 146. The Supreme Court also noted that the information given by the informant "was immediately verifiable at the scene" when the police officer saw a weapon in the defendant's waistband. *Id*.

In *Tooks*, 403 Mich at 577, the Michigan Supreme Court considered whether information relayed by a citizen-informant, "as opposed to a known informant," could supply reasonable suspicion for a search. The *Tooks* informant, "an unidentified citizen," approached police officers with a detailed description of a man who had allegedly shown a gun to two other men. *Id*. at 573-574. A short distance from the location of their meeting with the informant, the officers "encountered three males matching the descriptions given by the citizen," conducted a pat-down search of the defendant, and found a concealed pistol. *Id*. at 574. Although the Michigan Supreme Court in *Tooks* repudiated the idea that information supplied by a citizen-informant is inherently unreliable, the Court stopped well short of clothing a citizen-informant's tip with a presumption of credibility. See *id*. at 577-582. Rather, the Court held that "information provided to law enforcement officers by concerned citizens who have personally observed suspicious activities is entitled to a finding of reliability *when the information is sufficiently detailed and is corroborated within a reasonable period of time by the officers' own observations*." *Id*. at 577 (emphasis added). Applying the standards from *Terry* and *Adams*, the Supreme Court set forth "three related factors" that a court must consider "[i]n determining whether the information from the citizen-informant carried enough indicia of reliability to provide the officers with a reasonable suspicion . . . ." *Id*. The three factors are "(1)

the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors." *Id*.

In finding reliable the information supplied by the informant in *Tooks*, our Supreme Court drew heavily on the second factor, which concerns the specificity of the informant's information:

> This finding is enhanced by and is especially true in light of the second related factor; the detailed information provided regarding the suspects which allowed independent verification by the police of any persons investigated pursuant to that information. The importance of the preciseness of description allowing independent verification is great, as demonstrated by *Draper v United States*, 358 US 307; 79 S Ct 329; 3 L Ed 2d 327 (1959), where an informant's information was found to give police sufficient probable cause to arrest . . . . This kind of detail not only enhances the reliability of the information, but prevents the danger of widespread intrusion by indiscriminate stopping and frisking of members of the public. [*Tooks*, 403 Mich at 578-579.]

The Court later emphasized that it was "impressed with the detail and preciseness of the information given to the officers." *Id*. at 579-580. Moreover, the citizen-informant's information "was verified by the officers very shortly after it was given to them and within a few blocks of the location in which the officers had been given the information." *Id*. at 580.

In *Florida v JL*, 529 US 266; 120 S Ct 1375; 146 L Ed 2d 254 (2000), the United States Supreme Court again considered whether police action based on an anonymous tip by a citizen-informant withstood Fourth Amendment scrutiny. The anonymous tipster in that case reported "that a young black male standing at a particular bus stop and wearing a plaid shirt was

carrying a gun." *Id*. at 268. Shortly after the police arrived, they found three black males at the bus stop, one of whom wore a shirt consistent with the informant's description. "Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct." *Id*. An officer frisked the defendant and found a weapon. The Supreme Court observed that the anonymous call offered "no predictive information and therefore left the police without means to test the informant's knowledge or credibility." *Id*. at 271. The Supreme Court additionally emphasized that "[a]ll the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the defendant]." *Id.* Ultimately, the Supreme Court rejected the argument that the tip conveyed reasonable suspicion merely because it included "[a]n accurate description of a subject's readily observable location and appearance . . . ." *Id*. at 272. As most relevant here, the Supreme Court instructed that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id*.

In assessing whether a police officer possessed reasonable suspicion to stop a vehicle, courts have to take into account both the quantity (content) and quality (reliability) of the available information. *Alabama v White*, 496 US 325, 330; 110 S Ct 2412; 110 L Ed 2d 301 (1990). In this case, the sum of the quantity and quality of Bommarito's knowledge amounted to a decidedly small measure. In my calculus, Bommarito lacked any basis on which to judge the reliability of the passing motorist's allegation. When the woman drove off, Bommarito was "without means to test the informant's knowledge or credibility." *JL*, 529 US at 271. Further-

more, the content of the woman's accusation, "almost hit me," gave Bommarito no objective, verifiable basis to suspect Barbarich of violating a law. I will address separately these distinct concepts.

Although the woman in the oncoming pickup truck came face to face with Bommarito for a second or two, Bommarito did not know her or where he could locate her again. Bommarito conceded that he did not have an opportunity to observe the woman's license plate because "my focus was on that vehicle that she pointed out to me." Therefore, Bommarito had no information to help him assess the informant's veracity or her motive in making the accusation against Barbarich, and he entirely lacked any data validating the reliability of the information she relayed. The majority asserts that "the fact that the tipster was actually face to face with Bommarito when she relayed the tip, and thus likely knew that she could be subject to police questioning," enhances her credibility and the reliability of her tip. *Ante* at 480-481. But no evidence of record tends to establish that the woman "likely knew" that Bommarito could question her; the majority appears to have conjured this "fact" from thin air. To the contrary, Bommarito admitted that he did not know where the woman traveled after he "went to stop [Barbarich's] vehicle." Bommarito also conceded that he made no attempt to look for the woman. In my view, the woman's departure from the scene entirely undermines the majority's characterization of her reliability, credibility, and general good citizenship. The woman's absence also distinguishes this case from *People v Estabrooks*, 175 Mich App 532, 536-537; 438 NW2d 327 (1989), in which this Court noted, "[T]he fact that the [informant] was actually present and accusing defendant immediately after the rear-endings indicated reliability on the part of the informant." By deliberately limiting her interac-

tion with Bommarito to merely a passing moment, the informant in this case neither placed her anonymity at risk nor bolstered her reliability.

Furthermore, the unique situation here, a lip-read tip delivered by a rapidly passing motorist, shares no pertinent similarities to those face-to-face tips that are entitled to a finding of reliability. Usually, "[a] face-to-face encounter provides police officers the opportunity to perceive and evaluate personally an informant's mannerisms, expressions, and tone of voice (and, thus, to assess the informant's veracity more readily than could be done from a purely anonymous telephone tip)." *United States v Romain*, 393 F3d 63, 73 (CA 1, 2004). "[A] face-to-face encounter often provides a window into an informant's represented basis of knowledge . . . ." *Id*. In this case, Bommarito had no meaningful opportunity to assess the woman's demeanor or detect any emotion in her voice. The "window into [the woman's] represented basis of knowledge" remained closed. *Id*. Given the profound dearth of information available to Bommarito about the tipster, I score the quality of her information at close to zero.

Moreover, the woman supplied Bommarito with only a bare conclusion: "Almost hit me." This declaration contained no detail concerning the circumstances of the alleged near miss or any facts from which Bommarito could reasonably conclude that Barbarich had likely violated any law. In countless situations drivers "almost hit" each other without either being drunk or driving recklessly. Barbarich may have been momentarily inattentive and failed to keep the proper distance between his truck and the woman's. Alternatively, Barbarich may have pulled out of a parking lot without making a proper observation or changed lanes without first ascertaining whether another vehicle occupied the lane he

entered. Barbarich could have been talking on a cell phone or adjusting the radio, causing him to negligently swerve too close to the woman's truck. An anonymous tip that one driver has "almost hit" another simply fails to substantiate that the offending driver was illegally operating his vehicle.[1] Although the majority suggests that Bommarito inferred that Barbarich was driving illegally, this inference rested on no more than "an inchoate and unparticularized suspicion or hunch" and does not amount to reasonable suspicion for stopping a vehicle. *Wardlow*, 528 US at 124 (citation and quotation marks omitted). If the United States Supreme Court's admonition in *JL*, 529 US at 272, that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person" means anything, it mandates that a police officer possess some articulable basis for suspecting a crime before detaining a citizen. Bommarito articulated no basis here, aside from the tip.

However, even assuming that Bommarito legitimately translated "almost hit me" into "driving recklessly," MCL 257.742(3) circumscribed as follows Bommarito's authority to stop a vehicle:

> A police officer may issue a citation to a person who is a driver of a motor vehicle involved in an accident when, based upon personal investigation, the officer has reasonable cause to believe that the person is responsible for a civil infraction in connection with the accident. *A police*

[1] In this regard, the instant case is additionally distinguishable from *Estabrooks*. In that case, the informant advised a police officer that the defendant had rear-ended his motorcycle several times. *Estabrooks*, 175 Mich App at 534. This Court pointed out that although an "officer may not stop a driver for a civil infraction solely on the basis of a witness' complaint," *id*. at 537, citing MCL 257.742(3), the informant's information formed an ample basis for charging the defendant with a misdemeanor, *id.* at 538.

> *officer may issue a citation to a person who is a driver of a motor vehicle when, based upon personal investigation by the police officer of a complaint by someone who witnessed the person violating this act or a local ordinance substantially corresponding to this act, which violation is a civil infraction, the officer has reasonable cause to believe that the person is responsible for a civil infraction* and if the prosecuting attorney or attorney for the political subdivision approves in writing the issuance of the citation. [Emphasis added.]

The Michigan Vehicle Code, MCL 257.1 *et seq*., proscribes reckless driving, which it defines as driving "in willful or wanton disregard for the safety of persons or property . . . ." MCL 257.626(2). Absent any further description of Barbarich's driving, no evidence tended to prove that Barbarich had operated his vehicle in a manner consistent with willful or wanton disregard for the safety of persons or property. The vehicle code also proscribes careless or negligent driving, which includes vehicle operation in a "careless or negligent manner likely to endanger any person or property, but without wantonness or recklessness . . . ." MCL 257.626b. But the statement "almost hit me," without more information, hardly establishes reasonable cause to believe that Barbarich had driven inattentively or with indifference to his surroundings and falls far short of supplying the requisite evidence of a civil infraction.

Even if the woman's declaration could be construed as conveying that Barbarich had driven carelessly or recklessly, Bommarito nevertheless lacked the authority to stop Barbarich's truck. At most, the tip suggested that Barbarich had committed a civil infraction. A civil infraction "is not a crime" under Michigan law, MCL 257.6a, and the probable-cause standard applies to vehicle stops premised on civil infractions. "As a general matter, the decision to stop an automobile is reasonable

where the police have probable cause to believe that a traffic violation has occurred." *Whren v United States*, 517 US 806, 810; 116 S Ct 1769; 135 L Ed 2d 89 (1996). The United States Supreme Court explained in *Whren* that in civil infraction situations, the probable-cause standard affords the "quantum of individualized suspicion necessary to ensure that police discretion is sufficiently constrained." *Id*. at 817-818 (citation and quotation marks omitted); see also *United States v Freeman*, 209 F3d 464, 466 (CA 6, 2000). In light of the vague, conclusory nature of the woman's tip, Bommarito unquestionably did not possess probable cause to stop Barbarich for a traffic violation.

In my view, the majority ignores the critical difference between stopping a vehicle on the basis of a tip suggesting a crime in progress and a tip hinting at the commission of a civil traffic offense. Relying largely on *Wheat*, 278 F3d 722, the majority decries the danger attendant on waiting "to personally observe defendant engage in dangerous and erratic driving . . . ." *Ante* at 481-482. But here, unlike in *Wheat*, the evidence available to the arresting officer simply did not support the conclusion that the tipster had witnessed the erratic, dangerous maneuvers of a drunk driver. In *Wheat*, the Eighth Circuit described as follows the facts available to the arresting officer:

> On May 3, 1996, a motorist used his cellular phone to place a 9-1-1 call to the Blairsburg, Iowa Police Department. The caller reported that a tan- and cream-colored Nissan Stanza or "something like that," whose license plate began with the letters W-O-C, was being driven erratically in the northbound lane of Highway 169, eight miles south of Fort Dodge, Iowa. *The caller complained that the Nissan was passing on the wrong side of the road, cutting off other cars, and otherwise being driven as if by a "complete maniac."* The 9-1-1 operator did not ask the caller to identify himself.

> Police dispatchers relayed the caller's tip to patrolling officers. Shortly thereafter, Officer Paul Samuelson observed a tan Nissan Maxima whose license plate began with the letters W-O-C, stopped in the northbound lane of Highway 169 at the intersection of Highway 20. The Nissan made a right turn, and Officer Samuelson stopped it immediately, without having observed any incidents of erratic driving. [*Id*. at 724-725 (emphasis added).]

The details offered by the *Wheat* tipster gave rise to a reasonable inference that the driver of the Nissan was driving while impaired. The Eighth Circuit expressly recognized the importance of the tip's specificity: "In all cases . . . the more extensive the description of the alleged offense, the greater the likelihood that the tip will give rise to reasonable suspicion." *Id*. at 732 n 8. The court emphasized that a tip justifying a stop "must also contain a sufficient quantity of information to support an inference that the tipster has witnessed an actual traffic violation that compels an immediate stop. A law enforcement officer's mere hunch does not amount to reasonable suspicion . . . ; *a fortiori*, neither does a private citizen's." *Id*. at 732. In stark contrast, the tip at issue here gave no information concerning the circumstances of the near miss and no objective data on which to ground a conclusion that Barbarich was drunk. "[I]f failure to follow a perfect vector down the highway or keep[] one's eye on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy." *Freeman*, 209 F3d at 466 (citation and quotation marks omitted).

Finally, I respectfully take issue with the majority's rationalization of its decision by means of the precept that "the higher the governmental interest, the more likely a warrantless search or seizure is to be reasonable, especially if the implicated individual interest is

low." *Ante* at 472. In *Delaware v Prouse*, 440 US 648, 654; 99 S Ct 1391; 59 L Ed 2d 660 (1979), the United States Supreme Court explained that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Protection of the public against the danger of drunk driving certainly qualifies as a legitimate governmental interest worthy of promotion. But

> [a] central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. [*Brown v Texas*, 443 US 47, 51; 99 S Ct 2637; 61 L Ed 2d 357 (1979) (citation omitted).]

In this case, the tip provided Bommarito with an accusation suggesting that perhaps Barbarich had driven carelessly. However, the tipster offered no specific, objective facts reasonably establishing that Barbarich was driving while impaired. "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v United States*, 413 US 266, 273; 93 S Ct 2535; 37 L Ed 2d 596 (1973).

I would hold that an uncorroborated tip from an unidentifiable source lacking any pertinent detail and

suggesting only an ordinary traffic violation cannot serve as a vehicle for violating the Fourth Amendment, and thus dissent.

NELSON v DUBOSE

Docket Nos. 293455 and 294205. Submitted December 8, 2010, at Detroit. Decided February 1, 2011, at 9:20 a.m.

Alison R. Nelson brought an action in the Oakland Circuit Court against Freddie Dubose, seeking damages for noneconomic loss caused when defendant's car struck the rear of plaintiff's car while plaintiff was stopped at a red light. The parties disputed whether the injuries plaintiff received resulted in a serious impairment of body function. The jury found that plaintiff had not suffered a serious impairment of body function, and the court, Steven N. Andrews, J., entered a judgment of no cause of action in favor of defendant and denied plaintiff's motion for judgment notwithstanding the verdict. Plaintiff appealed and defendant cross-appealed (Docket No. 293455). Plaintiff also appealed the trial court's order regarding costs and fees (Docket No. 294205). The appeals were consolidated.

The Court of Appeals *held*:

The jury was properly instructed that a serious impairment of a body function is an objectively manifested impairment of an important body function that affects the plaintiff's general ability to lead his or her normal life. Because there was a question of fact whether plaintiff suffered a serious impairment of a body function, the determination of the jury that plaintiff did not suffer a serious impairment of a body function was within the range of principled outcomes. Because reasonable jurors could have differed in their interpretation of the evidence, the verdict must stand. The trial court did not err by denying the motion for judgment notwithstanding the verdict.

Affirmed.

JANSEN, P.J., concurring, agreed with the majority that reasonable jurors could honestly have disagreed whether plaintiff's injuries rose to the level of a serious impairment of body function and, therefore, the trial court did not err by denying plaintiff's motion for judgment notwithstanding the verdict. Judge JANSEN wrote separately to state her belief that the jury's determination that plaintiff's shoulder condition did not constitute a threshold injury was against the great weight of the evidence. The over-

whelming weight of the evidence tended to establish that plaintiff's shoulder injury affected her general ability to lead her normal life within the meaning of MCL 500.3135(7) and therefore constituted a serious impairment of body function sufficient to satisfy the threshold of MCL 500.3135(1). Plaintiff moved for a new trial on the ground that the verdict was against the great weight of the evidence, and the trial court denied the motion. Because plaintiff did not appeal the trial court's denial of her motion for a new trial, the Court of Appeals could not review the propriety of the trial court's denial.

1. TRIAL — MOTIONS AND ORDERS — JUDGMENT NOTWITHSTANDING THE VERDICT — APPEAL.

A trial court's decision to grant a motion for judgment notwithstanding the verdict is reviewed de novo on appeal; the jury's verdict must stand if reasonable jurors could have reached different conclusions; judgment notwithstanding the verdict is only appropriate if the evidence fails to establish a claim as a matter of law.

2. TRIAL — JURY INSTRUCTIONS — APPEAL.

A trial court's decision regarding what jury instructions should be given is reviewed on appeal for an abuse of discretion; a result that falls outside the range of principled outcomes is an abuse of discretion.

Giarmarco, Mullins & Horton, P.C. (by *Leland Prince*), and *Richard E. Shaw* for plaintiff.

James C. Rabaut & Associates (by *Brian D. Wright*) and *Gross & Nemeth, P.L.C.* (by *Mary T. Nemeth*), for defendant.

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

SAWYER, J. Plaintiff appeals a judgment of no cause of action entered after a jury found that plaintiff had not suffered a serious impairment of body function. We affirm.

Defendant's car rear-ended plaintiff's car while plaintiff was stopped at a red light. At the time of the accident, plaintiff believed that she was uninjured. But plaintiff later complained of shoulder, neck, and back

pain. Both parties provided medical experts to present to the jury. The jury heard the facts of the case and the differing medical opinions on plaintiff's injuries. Plaintiff argued that she suffered injuries to her neck and shoulder that caused her pain and limited her range of motion. She testified that she had undergone physical therapy and several surgeries and had been required to take off a significant amount of time from her work as a managing attorney for Ford Motor Company. But she was able to return to work, go on business trips, and participate in her different organizations and social events, although not as much as before the accident. Defendant argued that, even though plaintiff suffered an injury, there was enough evidence for a reasonable jury to find that the injury did not result in a serious impairment of body function.

MCL 500.3135(1) states that, under the no-fault insurance act, a defendant is only subject to tort liability for noneconomic loss caused by a car accident "if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." At the time of the trial, the definition of "serious impairment of body function" focused on the injury and whether the injury affected an important body function to the point of preventing the plaintiff from leading a normal life. *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004), overruled by *McCormick v Carrier*, 487 Mich 180, 214; 795 NW2d 517 (2010). The Court in *Kreiner* gave a nonexhaustive list of factors to use in evaluating whether the plaintiff's injuries affected the plaintiff's general ability to lead a normal life. *Kreiner*, 471 Mich at 133. After the trial in this case, the Michigan Supreme Court overruled *Kreiner* in *McCormick*. *McCormick* shifted the focus from the injuries themselves to how the injuries affected the plaintiff's body function. *McCormick*, 487 Mich at 197. This shift

eased the burden on the plaintiff to show how the impairment prevented the plaintiff from leading a normal life. Now, the plaintiff has to show that the plaintiff's ability to lead a normal life has been affected by comparing the plaintiff's life before and after the injury. *Id.* at 200, 202-203.

Plaintiff argues that the facts clearly showed that plaintiff suffered a serious impairment of a body function and, therefore, the trial court erred by denying plaintiff's motion for judgment notwithstanding the verdict (JNOV). Plaintiff argues that the case should be decided in light of *McCormick*. This Court reviews de novo the trial court's decision to grant JNOV, and, if reasonable jurors could have reached different conclusions, the jury verdict must stand. *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009); *Guerrero v Smith*, 280 Mich App 647, 666; 761 NW2d 723 (2008). JNOV is only appropriate if the evidence fails to establish a claim as a matter of law. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003); *Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 255-256; 761 NW2d 694 (2008).

While the definition of "serious impairment of body function" has changed, possibly allowing more serious-impairment questions to go to a jury, the statute itself remains the same. The question whether there is a serious impairment of body function is a question of law if there is no factual dispute about the injuries, or if any factual dispute is immaterial to the question. MCL 500.3135(2)(a); *McCormick*, 487 Mich at 192-193. Here, the court determined that there was a factual dispute and sent the question to the jury. The jury heard all the evidence presented by both parties on all the injuries and returned with a verdict finding no serious impairment of body function. While the jury did not specify

which injuries it was referring to with the verdict, the jury instructions included all the injuries contested at trial. It can be assumed that the jury found that none of plaintiff's injuries caused a serious impairment of a body function.

This Court reviews a trial court's decision regarding jury instructions for an abuse of discretion. *Guerrero*, 280 Mich App at 660. The Michigan Supreme Court describes an abuse of discretion as a result that falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Therefore, this Court generally defers to the trial court's decision unless that decision results in an outcome that is outside the range of principled outcomes. *Maldonado*, 476 Mich at 388. Here, there were no instructional errors. The jury was instructed that a serious impairment of a body function was "an objectively manifested impairment of an important body function that affects the plaintiff's general ability to lead her normal life." The jury instructions did not include wording specific to *Kreiner*'s more stringent definition. After hearing the instructions and all the evidence, the jury returned a verdict of no serious impairment of a body function that, because it was a question of fact, was within the range of principled outcomes. As long as the jury did not hear anything prejudicial in reference to *Kreiner*, the case does not have to be retried in light of *McCormick*. When reasonable jurors could differ in their interpretation of the evidence, the verdict will stand. *Guerrero*, 280 Mich App at 666.

In sum, even in light of *McCormick*, the trial court did not err by denying JNOV.

In light of our disposition of these issues, we need not address the parties' remaining issues, which would be relevant only if we were to reverse the trial court's judgment.

Affirmed. Defendant may tax costs.

O'CONNELL, J., concurred.

JANSEN, P.J. (*concurring*). I must agree with the majority's conclusion that reasonable jurors could honestly have disagreed concerning whether plaintiff's injuries rose to the level of a "serious impairment of body function" and that the trial court therefore did not err by denying plaintiff's motion for judgment notwithstanding the verdict. *Guerrero v Smith*, 280 Mich App 647, 666; 761 NW2d 723 (2008).

I write separately because, although I cannot say with absolute certainty that plaintiff sustained a serious impairment of body function *as a matter of law*, I believe that the jury's determination that plaintiff's shoulder condition did not constitute a threshold injury was against the great weight of the evidence. The overwhelming weight of the evidence at trial established that plaintiff's shoulder injury *did* affect her "general ability to lead . . . her normal life" within the meaning of MCL 500.3135(7). After the automobile accident but before her shoulder surgery, plaintiff was unable to work as many hours as she had before the accident. This is because she was required to arrive late for work or leave work early to accommodate her physical-therapy schedule. Thereafter, following her shoulder surgery, plaintiff's arm was in a sling for several weeks.[1] Plaintiff testified that she could not use a computer as well as before the accident, that she could not sit for long periods as she had before the accident, and that her attention level had been altered because of prescription pain medication. In addition, plaintiff tes-

[1] Moving one's arm is an important body function. See *Williams v Medukas*, 266 Mich App 505, 506, 509; 702 NW2d 667 (2005).

tified that she was unable to participate to the same degree as before the accident in her extensive professional activities, travel, and golf. Following the accident, plaintiff also quit volunteering for her church and drastically reduced her involvement in other community activities. The uncontroverted evidence established that plaintiff's shoulder injury kept her from various activities that were important to her.

Plaintiff moved for a new trial pursuant to MCR 2.611(A)(1)(e) on the ground that the jury's verdict was against the great weight of the evidence. The trial court denied this motion, allowing the jury's verdict to stand. For the foregoing reasons, I believe that the trial court abused its discretion by denying plaintiff's motion for a new trial. *Guerrero*, 280 Mich App at 666. In my opinion, the overwhelming weight of the evidence in this case, *id.*, tended to establish that plaintiff's shoulder injury affected her "general ability to lead . . . her normal life" within the meaning of MCL 500.3135(7) and therefore constituted a "serious impairment of body function" sufficient to satisfy the threshold of MCL 500.3135(1).

The obvious problem with this is that the propriety of the trial court's ruling on plaintiff's motion for a new trial has not been presented for appellate review and is not properly before this Court. MCR 7.212(C)(5) and (7); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007); *In re JS*, 231 Mich App 92, 98; 585 NW2d 326 (1998), overruled in part on other grounds by *In re Trejo Minors*, 462 Mich 341 (2000). As a consequence, I must reluctantly concur with the result reached by the majority in this case.

PEOPLE v KING

Docket No. 294682. Submitted November 4, 2010, at Lansing. Decided February 3, 2011, at 9:00 a.m.

Larry S. King was charged in the 66th District Court with two counts of manufacturing marijuana after police officers found marijuana growing in a locked chain-link dog kennel in his backyard and in an unlocked closet inside his house. Defendant moved in the Shiawassee Circuit Court to quash the bindover or suppress evidence obtained in the search, raising various grounds and asserting the affirmative defense provided by the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. The court, Gerald D. Lostracco, J., concluding that the marijuana had been kept in an enclosed, locked facility as required by the act and that defendant was therefore entitled to the protection of the affirmative defense provision, dismissed the charges. The prosecution appealed.

The Court of Appeals *held*:

The MMMA did not abrogate state criminal prohibitions of the manufacturing of marijuana, but merely provided a procedure by which seriously ill individuals using marijuana for specified medical purposes can be identified and protected from prosecution under state law. MCL 333.26428 allows a defendant to assert a defense to charges of violating the controlled substances laws if the statute's conditions are followed. MCL 333.26424(a) provides that marijuana plants cultivated for medical purposes must be kept in an enclosed, locked facility, which MCL 333.26423(c) defines as a closet, room, or other enclosed area equipped with locks or other security devices. A proper enclosure must be of the same kind or character as a closet or room, that is, stationary and closed on all sides, and the facility must have locks or other security devices limiting access to the licensed grower or qualifying patient. Because the dog kennel was movable and not closed on all sides, it was not an enclosed facility, and because the closet in defendant's house was not locked and the home itself did not have locks on all the doors, the closet was also not an enclosed, locked facility. The trial court abused its discretion by dismissing the charges against defendant because he had not complied with the strict requirements of the MMMA.

Reversed and remanded for further proceedings.

FITZGERALD, J., dissenting, would have held that the phrase "enclosed, locked facility" in MCL 333.26424(a) should be interpreted as understood by the voters who approved the MMMA. He concluded that both the dog kennel and defendant's house satisfied the definition of an enclosed, locked facility and that the trial court properly dismissed the charges.

CONTROLLED SUBSTANCES — MEDICAL MARIJUANA — CRIMINAL DEFENSES.

Marijuana plants cultivated for medical purposes must be kept in an enclosed, locked facility, which is defined under the Michigan Medical Marihuana Act as a closet, room, or other enclosed area equipped with locks or other security devices; under the statute, a proper enclosure must be similar to a closet or room, that is, it must be stationary and closed on all sides, and the facility must have locks limiting access to the person authorized under the act to grow the marijuana or the qualifying patient (MCL 333.26423[c], 333.26424[a]).

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, *Randy O. Colbry*, Prosecuting Attorney, and *Sara Edwards*, Assistant Prosecuting Attorney, for the people.

Matthew R. Abel and *Alan L. Kaufman* for defendant.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

SAAD, J. The prosecution appeals the trial court's order that dismissed two counts against defendant for the manufacture of a controlled substance (marijuana), MCL 333.7401(2)(d)(*iii*). For the reasons set forth in this opinion, we reverse and remand for further proceedings consistent with this opinion.

I. NATURE OF THE CASE

Defendant, who was arrested for illegally growing marijuana, possesses a registry identification card under the Michigan Medical Marihuana Act (MMMA),

MCL 333.26421 *et seq.*, and claims that he is entitled to the limited protections of the MMMA because he complied with its statutory provisions. The trial court ruled that the charges against defendant must be dismissed because he satisfied the elements of the affirmative defense outlined in § 8 of the MMMA, MCL 333.26428. Though defendant timely raised a § 8 defense, he did not fulfill the requirements of § 8. Clearly, by its reference to § 7 of the MMMA, MCL 333.26427, § 8 required defendant to comply with other applicable sections of the MMMA, which includes the requirements set forth in § 4, MCL 333.26424, concerning the growing of marijuana. Furthermore, as a registered cardholder, defendant must comply with the provisions of § 4 concerning growing marijuana, MCL 333.26424(a). Also, defendant maintains, and the trial court erroneously ruled, that defendant complied with § 4 by growing the marijuana in an "enclosed, locked facility." We disagree that defendant adhered to the requirements of § 4 of the MMMA and therefore hold that defendant is not entitled to the benefit of the protections of the MMMA. The trial court abused its discretion when it dismissed the charges against him.

II. FACTS

The Michigan State Police received an anonymous tip that someone was growing marijuana in the backyard of a house at 710 Grace Street in Owosso. On May 13, 2009, Detective Sergeant Brian Fox and Deputy Jed Eisenberger drove to the address and saw a chain-link dog kennel behind the house. Though the sides of the kennel were covered with black plastic, some areas of the kennel were uncovered and, using binoculars, Deputy Eisenberger could see marijuana plants growing inside.

Detective Fox and Deputy Eisenberger went to the door of the house and spoke to defendant, who produced a medical-marijuana card that was issued on April 20, 2009. The officers asked defendant to show them the marijuana plants, and defendant unlocked a chain lock on the kennel. The kennel was six feet tall, but had an open top and was not anchored to the ground. Defendant disclosed that he had more marijuana plants inside the house. After they obtained a search warrant, the officers found marijuana plants growing inside defendant's unlocked living room closet.

As noted, defendant was charged with two counts of manufacturing marijuana. After the prosecutor presented his proofs at the preliminary examination, defendant moved to dismiss the charges under the affirmative defense section of the MMMA. The district court denied defendant's motion and bound defendant over for trial. In the circuit court, defendant filed a motion to quash the bindover or suppress the evidence obtained during the search. He also sought to dismiss the charges on various grounds. Among other arguments, defendant maintained that the search warrant was invalid because it was based on hearsay. Defendant also sought to assert an affirmative defense under the MMMA. In response, the prosecutor argued that the search warrant was valid and that defendant had failed to comply with the MMMA because he did not keep the marijuana in an enclosed, locked facility pursuant to MCL 333.26424(a).

The trial court issued an opinion and order on September 30, 2009. The court ruled that, because defendant had a medical-marijuana registry identification card and kept "a legal quantity" of marijuana in an enclosed, locked facility, there was no probable cause to support the issuance of the search warrant for his

home. Nonetheless, the court ruled that the evidence seized during the search should not be suppressed because the officers had acted in good-faith reliance on the warrant. However, the court held that the officers should not have seized the marijuana because defendant complied with the requirements of the MMMA. For the same reason, the court ruled that defendant was entitled to assert an affirmative defense under the MMMA, and it granted defendant's motion to dismiss the charges.

III. ANALYSIS

"We review a trial court's decision to grant or deny a motion to dismiss charges for an abuse of discretion." *People v Kevorkian*, 248 Mich App 373, 383; 639 NW2d 291 (2001). The prosecution contends that the trial court incorrectly interpreted the meaning of "enclosed, locked facility" in MCL 333.26424(a) and MCL 333.26423(c) and that it erred when it ruled that defendant had complied with the statute. We review de novo questions of statutory interpretation. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.). "When interpreting statutes, our goal is to give effect to the intent of the Legislature by reviewing the plain language of the statute." *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005).

Again, the prosecution charged defendant with violating Michigan's controlled substances act by growing marijuana, but defendant maintains that he is entitled to the protections from prosecution laid out in the recently enacted MMMA. By passing statutes that criminalize the possession, use, and manufacture of controlled substances, including marijuana, our Legislature and Congress have determined that such sub-

stances are harmful and prohibited.[1] As Judge O'CONNELL observed in his concurrence in *People v Redden*, 290 Mich App 65, 92; 799 NW2d 184 (2010):

> [T]he MMMA does not create any sort of affirmative *right* under state law to use or possess marijuana. That drug remains a schedule 1 controlled substance under the Public Health Code, MCL 333.7212(1)(c), meaning that "the substance has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision," MCL 333.7211. The MMMA does not repeal any drug laws contained in the Public Health Code, and all persons under this state's jurisdiction remain subject to them. Accordingly, mere possession of marijuana remains a misdemeanor offense, MCL 333.7403(2)(d), and the manufacture of marijuana remains a felony, MCL 333.7401(2)(d).

By its terms, the MMMA does not abrogate state criminal prohibitions of the manufacturing of mari-

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[1] The statute at issue here, MCL 333.7401, provides, in relevant part:

> (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.
>
> (2) A person who violates this section as to:
>
> * * *
>
> (d) Marihuana or a mixture containing marihuana is guilty of a felony punishable as follows:
>
> * * *
>
> (*iii*) If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years or a fine of not more than $20,000.00, or both.

juana. Rather, the MMMA "merely provides a procedure through which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law." *Redden*, 290 Mich App at 93 (O'CONNELL, P.J., concurring). Although these individuals continue to violate the Public Health Code by using marijuana, the MMMA sets forth narrow circumstances under which they can avoid criminal liability. In other words, the MMMA constitutes a determination by the people of this state that there should exist a very limited, highly restricted exception to the statutory proscription against the manufacture and use of marijuana in Michigan. As such, the MMMA grants narrowly tailored protections to qualified persons as defined in the act if the marijuana is grown and used for certain narrowly defined medical purposes. Further, the growing of marijuana is tightly constrained by specific provisions that mandate how, where, for what purpose, and how much marijuana may be grown.

Section 8 of the MMMA provides a defendant with an opportunity to assert a defense to the controlled substance laws if the conditions set forth in § 8 are followed. MCL 333.26428. Moreover, § 8 incorporates by reference other provisions of the MMMA with which a defendant must comply. Section 8 specifically states that a patient may assert a medical purpose defense to any marijuana prosecution, "[e]xcept as provided in section 7 . . . ." MCL 333.26428(a). Section 7(a) provides that "[t]he medical use of marihuana is allowed under state law *to the extent that it is carried out in accordance with the provisions of this act*." MCL 333.26427(a) (emphasis added). In *Redden*, this Court held that the statute permits an unregistered patient to assert the affirmative defense under § 8 if he or she meets the requirements of § 8. *Redden*, 290 Mich App at 81, 85.

We hold that § 8 permits a "registered qualifying patient" to raise an affirmative defense under § 8, just as an unregistered defendant may under *Redden*. We further hold that the express reference to § 7 and the statement in § 7(a) that medical use of marijuana must be carried out in accordance with the provisions of the MMMA require defendant to comply with the provisions of § 4 concerning growing marijuana. And in any case, § 4 applies to defendant because he grew marijuana under a claim that he is a qualifying patient in possession of a registry identification card.[2] We hold that because defendant did not comply with § 4, he also failed to meet the requirements of § 8 and, therefore, he is not entitled to the affirmative defense in § 8 and is not entitled to dismissal of the charges.

Section 4(a), MCL 333.26424(a), provides, in relevant part:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility.

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[2] This holding is supported by the ballot proposal itself, Proposal 08-1, which stated that certain registered patients would be permitted to cultivate marijuana within certain restrictions. The proposal specifically provided that the law would "[p]ermit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility."

The MMMA defines "enclosed, locked facility" as follows: " 'Enclosed, locked facility' " means a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient." MCL 333.26423(c).

We hold that the trial court incorrectly interpreted and applied the phrase "enclosed, locked facility." As this Court recently opined in *Redden*,

> [t]his issue presents a question of statutory interpretation. We review de novo issues of statutory interpretation. *People v Stone Transp, Inc*, 241 Mich App 49, 50; 613 NW2d 737 (2000). Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature's intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The MMMA was enacted as a result of an initiative adopted by the voters. "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id*. This Court must avoid a construction that would render any part of a statute surplusage or nugatory, and "[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005). [*Redden*, 290 Mich App at 76-77.]

As noted, the phrase "enclosed, locked facility" is defined by the MMMA to mean "a closet, room, or other enclosed area equipped with locks or other security devices . . . ." MCL 333.26423(c). As described earlier, defendant grew several marijuana plants in his backyard, within a chain-link dog kennel that was only partially covered on the sides with black plastic. The kennel had a lock on the chain-link door, but had no

fencing or other material over the top, and it could be lifted off the ground. Defendant maintains that the kennel constitutes an "enclosed area" within the definition of "enclosed, locked facility" and, therefore, that he complied with the statute. The trial court simply based its interpretation of "other enclosed area" on the definition of "enclose" in Black's Law Dictionary and concluded, without analysis, that the kennel complied with this definition.[3]

The trial court's interpretation and application of the phrase "enclosed, locked facility" is contrary to settled rules of statutory construction. The statutory reference to "other enclosed area" within the definition of "enclosed, locked facility" is a general phrase that follows the words "closet" and "room," both of which have specific, limited meanings and which have the common characteristic of being stationary and closed on all sides. It would frustrate the intent of the MMMA to read the definition of "enclosed, locked facility" as meaning something akin to a moveable fence simply on the basis of a dictionary definition when the enumerated examples that precede "other enclosed area" suggest a much greater level of protected confinement.

Our courts must give effect to the language in the statute and elucidate the intent of the voters by considering not only the words themselves, but their placement and purpose in the statutory scheme. To that end, it is appropriate here to apply the doctrine of statutory construction *ejusdem generis*, which provides that "the scope of a broad general term following a series of items is construed as including 'things of the same kind, class, character, or nature as those specifically enumer-

[3] Moreover, we observe that the trial court cited a definition that specifies enclosure on all sides, but nonetheless concluded that the open-top kennel satisfies the definition.

ated . . . .' " *People v Thomas*, 263 Mich App 70, 76; 687 NW2d 598 (2004), quoting *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 349; 656 NW2d 175 (2003), and *Huggett v Dep't of Natural Resources*, 464 Mich 711, 718-719; 629 NW2d 915 (2001). Under the doctrine, "other enclosed area" would, thus, be limited to things of the same kind or character as a closet or room. An open, moveable, chain-link kennel is not of the same kind or character as a closet or room. We further observe that the examples given in the statutory definition are followed by the additional requirement that the closet, room, or other enclosed area be equipped with locks or other security devices that permit access only by the registered caregiver or qualifying patient. In context, the clear purpose of specifying that the marijuana be kept within a secure facility is to ensure that it is inaccessible to anyone other than a licensed grower or a qualifying patient, as defined in the MMMA, for the limited purpose set forth in the MMMA. Moreover, these provisions are obviously meant to prevent access by the general public and, especially, juveniles. This reading of the MMMA is consistent with its limited protections for a narrowly defined group of medical users of a controlled substance, the general cultivation and use of which remains illegal under both state and federal law. Reading the statute broadly as the trial court did to permit marijuana to be kept in the type of space used by defendant would, quite simply, undermine the plain language and purpose of the statutory provisions.

We further hold that although the plants inside defendant's home were kept in a closet, which is the type of enclosure specifically enumerated in the statute, it is undisputed that there was no lock on the closet door. The statute explicitly states that the enclosed area itself must have a lock or other security device to

prevent access by anyone other than the person licensed to grow marijuana under the MMMA. An unlocked closet would permit access by anyone else within the home, and it appears that the home itself was not secured by locks on all of the doors. The trial court's conclusion that defendant acted as a "security device" for the marijuana growing inside his home is pure sophistry and belied by defense counsel's unsurprising admission at oral argument in this Court that, at times, defendant left the property, thus leaving the marijuana without a "security device" and accessible to someone other than defendant as the registered patient.

Because defendant failed to comply with the strict requirements in the MMMA that he keep the marijuana in an "enclosed, locked facility," he is subject to prosecution under MCL 333.7401(2)(d)(*iii*), and the trial court abused its discretion by dismissing the charges against defendant.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

SAWYER, P.J., concurred.

FITZGERALD, J. (*dissenting*). I respectfully dissent.

The police had received an anonymous tip that defendant was growing marijuana in his backyard. The police then drove to the driveway of defendant's neighbor. Using binoculars, the police were able to observe marijuana plants growing in a dog kennel in defendant's backyard. The dog kennel was made of six-foot-high chain-link fence covered with black shrink-wrap. The police were able to see that a section of the shrink-wrap had been detached. They then approached defendant's home, knocked on the door, and asked if defendant had a medical-marijuana card. Defendant

produced his card. The police then asked if defendant would allow them to see the plants. Defendant went back inside the house to obtain the key to the lock on the kennel. He then went with officers around the house and opened the lock on the kennel. The officers asked if he had more marijuana in the home. Defendant stated that he did, but that the officers would need a search warrant. The police then obtained a search warrant. Six marijuana plants, processed marijuana, and plants in various states of processing were found inside the home.

Defendant moved to dismiss the charges of manufacturing marijuana pursuant to the Michigan Medical Marihuana Act (MMMA),[1] MCL 333.26421 *et seq*. The MMMA was passed by initiative on November 4, 2008, and went into effect soon thereafter. The MMMA declares that in "changing state law," the act was designed to "have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana." MCL 333.26422(b). The MMMA further declares that the laws of certain other states "do not penalize the medical use and cultivation of marihuana. Michigan joins in this effort for the health and welfare of its citizens." MCL 333.26422(c). Such declarations reveal the intent that the MMMA be used not as a sword against those who have a medical need to use marijuana, but as a shield.

MCL 333.26424(a) of the MMMA allows a qualifying patient who has been issued a registry identification card to possess 2.5 ounces of marijuana and to cultivate 12 marijuana plants (if the patient has not designated a primary caregiver) and not be subject to arrest or

[1] Although the statute spells it "marihuana," unless used in a direct quotation, I have spelled it throughout as "marijuana," as that is the more commonly used spelling.

prosecution for possession of the marijuana or for growing the plants. Specifically, MCL 333.26424(a) states:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an *enclosed, locked facility.* [Emphasis added.]

There is no dispute that defendant is a qualifying patient in possession of a valid registry card.[2] The prosecution argues that defendant was not entitled to the protection of this statutory section because he was not growing his marijuana plants in an enclosed, locked facility. In particular, the prosecution asserts that the dog kennel in defendant's backyard was not an enclosed, locked facility because it lacked a roof or a top and was movable. Additionally, the prosecution asserts that defendant's house was not an enclosed, locked facility because the back door lacked a lock.

The narrow issue before this Court is the interpretation of the term "enclosed, locked facility" as used in MCL 333.26423(c) of the MMMA. Questions of statutory interpretation are reviewed de novo. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.).

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[2] The prosecution does not dispute that defendant was entitled to possess 2.5 ounces of marijuana.

The purpose of statutory construction is to discern and give effect to the intent of the Legislature. *Feezel*, 486 Mich at 205. The MMMA was enacted as a result of an initiative adopted by the voters. The words of an initiated law are given their ordinary and customary meaning as the voters would have understood them. In the absence of a statutorily provided definition, a statutory term will be given its ordinary meaning. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006). The ordinary meaning of a term may be discerned by consideration of dictionary definitions. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). This Court presumes that the meaning as plainly expressed in the statute is what was intended. *People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010).

The MMMA defines "enclosed, locked facility" as follows: " 'Enclosed, locked facility' means a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient." MCL 333.26423(c).

Clearly, the outdoor dog kennel could only qualify as an enclosed, locked facility under the term "other enclosed area." MCL 333.26423(c) does not define the word "enclosed." *Random House Webster's College Dictionary* (1997) contains the following definitions of "enclose": "1. to close in on all sides; shut in. 2. to surround, as with a fence; *to enclose land*. 3. to insert in the same envelope, package, etc.: *to enclose a check*. 4. to contain or hold." Under these definitions, the dog kennel in this case would fall under the definition of "other enclosed area." The chain-link walls of the kennel were six feet high, and the area surrounded by the chain-link walls was closed in on all sides. Like a fence that surrounds land (as in the dictionary ex-

ample), the kennel did not have a top, but, by dictionary definition, a top is not required to "enclose" something."[3] Defendant covered the walls of the kennel with black shrink-wrap in an attempt to conceal the contents of the enclosure. Additionally, the kennel was equipped with a lock, and defendant maintained the key to the lock, thereby satisfying the additional requirement that the "other enclosed area" be equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient. MCL 333.26423(c). Thus, in my view, the dog kennel qualified as an "enclosed, locked facility."

The prosecution further argues that defendant's house was not an enclosed, locked facility because the back door did not have a lock. MCL 333.26423(c) requires that such a facility be equipped with "locks" or "other security devices." The term "other security devices" is not defined in the MMMA. The dictionary defines a "device" as "1. a thing made for a particular purpose, [especially] a mechanical, electric, or electronic invention or contrivance." *Random House Webster's College Dictionary* (1997). Given that the statutory definition of an "enclosed, locked facility" allows for not only locks, but also "other security devices" to be used, the term "locked" should be broadly interpreted. Indeed, it appears from the use of the term "other security devices" that the intent is that the facility be "secure."

Michigan State Police Detective Sergeant Brian Fox presented testimony at the preliminary examination that the back door of defendant's home did not have a knob and that he did not "think" that defendant was

[3] Contrary to the prosecution's suggestion, nothing in the statutory definition of "enclosed, locked facility" prevents the facility from being movable.

able "to lock or to keep the house secure." However, the lack of a knob on the back door does not necessarily mean that defendant's house was not secure. As the statutory definition makes clear, the door could have been secured by other devices. Some other "contrivance" for securing or fastening would satisfy the statute. Although Fox testified that he did not see a board that kept the door closed from the inside, that does not mean that there was no mechanism to keep the door secure. In my view, in the absence of evidence that persons other than defendant had access to or actually entered the home, defendant's home satisfied the definition of "enclosed, locked facility."

Furthermore, the definition of "enclosed, locked facility" reveals the people's intent that the marijuana being cultivated be accessible only by a registered primary caregiver or registered qualifying patient. In other words, the concern is that the marijuana being cultivated not be accessible by anyone other than a registered primary caregiver or registered qualifying patient. As previously noted, the declared intent of the MMMA is "to protect[] from arrest the vast majority of seriously ill people who have a medical need to use marihuana." MCL 333.26422(b). Rather than rigid definitions of "other enclosed area," "locked," and "other security device," the true key to determining whether defendant's dog kennel and home were enclosed, locked facilities for purposes of the MMMA is to determine whether access to the marijuana in the dog kennel and the house was possible "only by a primary caregiver or registered qualifying patient." MCL 333.26423(c).

The evidence in the record indicates that the dog kennel where defendant was growing marijuana was located in his backyard. The walls of the kennel were

made of six-foot-high chain-link fence wrapped in black plastic. Parts of the black plastic had blown open, allowing Fox and another deputy to see defendant's marijuana from the street with the use of binoculars. The kennel was locked, and Fox and the deputy were only able to access it after defendant obtained a key for the lock from his house. The prosecution did not allege that anyone had attempted to steal defendant's marijuana plants. Rather, the prosecution argued that access to the marijuana plants was not limited to defendant because someone could move the kennel or climb over the six-foot walls to access the marijuana plants. However, the evidence presented at the preliminary examination revealed that defendant had to obtain a key to gain access to the marijuana. No evidence was presented that anyone had tried to move the kennel or climb over the kennel to obtain the marijuana. In fact, no evidence was presented that anyone other than defendant had access to the marijuana. The prosecution's argument is premised solely on a set of hypothetical facts.

Similarly with respect to defendant's house, we need not find a rigid definition for "locked" that requires the use of a key. Instead, the determination to be made is whether only defendant had access to the marijuana in his house. Defendant refused to allow Fox and the other officer access to his house. The police obtained access to the house only by securing a search warrant. No evidence was presented that anyone other than defendant had access to the house. I would conclude that defendant was growing marijuana in accordance with the provisions of the MMMA. The evidence from the preliminary examination reveals that access to both the kennel and the house was limited to defendant, which was sufficient for purposes of MCL 333.26424.

I find it worthy to note that this is not a case involving an individual who was trying to flout the clear prohibitions of the Public Health Code and engage in recreational use of marijuana. This is a case involving an individual who went through the necessary procedure to become a qualifying patient who was issued a valid registry identification card. The MMMA's susceptibility to multiple interpretations should not result in the use of the act as a sword rather than a shield under the circumstances of this case.

I would affirm the learned circuit judge's dismissal of the charges against defendant.

MCCRACKEN v CITY OF DETROIT

Docket No. 294218. Submitted December 9, 2010, at Detroit. Decided February 8, 2011, at 9:00 a.m.

Thomas McCracken, Richard Cadoura, Michael Kearns, and Michael Christy filed suit in the Wayne Circuit Court against the city of Detroit and related defendants, alleging violations of the Civil Rights Act, MCL 37.2010 *et seq*. When defendants filed their answer, they attached to it a separately captioned document entitled "Special and Affirmative Defenses" in which they demanded a response to the affirmative defenses. When plaintiffs did not respond to this demand within 21 days, defendants moved for summary disposition, arguing that plaintiffs' failure to respond to the affirmative defenses amounted to an admission regarding the truth of those defenses and that, therefore, plaintiffs' suit should be dismissed. The court, Prentis Edwards, J., agreed and granted defendants' motion. Plaintiffs appealed.

The Court of Appeals *held*:

1. Under MCR 2.110(A), the definition of the term "pleading" includes only (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer. No other filings constitute pleadings. Defendants' affirmative defenses, filed separately from their answer, were not pleadings.

2. Under MCR 2.110(B), the only pleadings requiring a response are (1) a complaint, (2) a counterclaim, (3) a cross-claim, (4) a third-party complaint, or (5) an answer demanding a reply. Defendants' affirmative defenses, filed separately from the answer, were none of these and so they were not pleadings requiring a response even though they included a demand for a response. The court erred by deeming them admitted.

Reversed.

1. PLEADING — AFFIRMATIVE DEFENSES.

The term "pleading" as defined in the Michigan Court Rules includes only (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-

claim, counterclaim, or third-party complaint, and (6) a reply to an answer; no other filings constitute pleadings; affirmative defenses, filed separately from an answer, are not pleadings (MCR 2.110[A]).

2. PLEADING — PLEADINGS REQUIRING A RESPONSE — AFFIRMATIVE DEFENSES.

The only pleadings requiring a response are (1) a complaint, (2) a counterclaim, (3) a cross-claim, (4) a third-party complaint, or (5) an answer demanding a reply; affirmative defenses filed separately from an answer are not pleadings requiring a response even if they include a demand for a response.

Norman Yatooma & Associates, P.C. (by *Robert S. Zawideh* and *Howard Yale Lederman*), for plaintiffs.

Andrew Jarvis, Assistant Corporation Counsel, for defendants.

Before: SHAPIRO, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM. Plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition. The trial court found that plaintiffs had effectively "admitted" defendants' affirmative defenses when failing to specifically deny them in a timely manner, particularly after defendants had demanded a response to the affirmative defenses. We hold that affirmative defenses are not pleadings requiring a response under MCR 2.110(A) and (B). Moreover, we hold that affirmative defenses are to be taken as denied even if they include a demand for a response. Accordingly, we reverse the trial court's order and remand to the trial court for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

Plaintiffs were Caucasian employees of the Emergency Medical Services department of the City of Detroit Fire Department. They filed an amended complaint and a demand for a jury trial against defendants

on June 15, 2009, alleging race discrimination and a hostile work environment under the Civil Rights Act (CRA), MCL 37.2101 *et seq*. On July 26, 2009, defendants filed an answer to plaintiffs' amended complaint. In the answer, defendants did not demand a reply to the answer. However, in a separately captioned document attached to the answer, defendants filed special and affirmative defenses, at the end of which defendants wrote, "[d]efendants demand an answer to these affirmative defenses." Plaintiffs did not respond to the affirmative defenses within 21 days.

On August 7, 2009, defendants filed a motion for judgment, arguing that plaintiffs' failure to respond to defendants' affirmative defenses amounted to an admission regarding the truth of the affirmative defenses and, as a result, plaintiffs' complaint should be dismissed. Plaintiffs filed a response to defendants' special and affirmative defenses on August 14, 2009. The same day, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing again that plaintiffs' failure to respond to the affirmative defenses as required under the Michigan Court Rules meant that the affirmative defenses should be deemed admitted and defendants should be entitled to summary disposition.

A hearing was held regarding defendants' motion for summary disposition. The trial court concluded that plaintiffs were required to respond to defendants' affirmative defenses under the Michigan Court Rules and their failure to do so entitled defendants to summary disposition. Plaintiffs now appeal.

II. STANDARD OF REVIEW

This case requires us to examine the application and interplay between the Michigan Court Rules

regarding affirmative defenses and pleadings. The interpretation of a court rule involves a question of law subject to de novo review, but the factual findings underlying a trial court's application of a court rule are reviewed for clear error. MCR 2.613(C); *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). A finding is clearly erroneous when the appellate court "is left with a definite and firm conviction that a mistake has been made." *Id.*

The rules of statutory construction apply to the interpretation of court rules. *Hill v City of Warren*, 276 Mich App 299, 305; 740 NW2d 706 (2007). The goal in interpreting a court rule is "to give effect to the intent of the Supreme Court, the drafter of the rules." *Jenson v Puste*, 290 Mich App 338, 341; 801 NW2d 639 (2010). The first step in construing a court rule is to analyze the language used "because the words contained in the court rule are the most reliable evidence of the drafters' intent." *Id.* at 341-342. The provision must be considered in its entirety, and within the context of the rules, to produce "a harmonious whole." *Id.* at 342. When "a court rule provides its own glossary, the terms must be applied as expressly defined." *Richmond Twp v Erbes*, 195 Mich App 210, 225; 489 NW2d 504 (1992), overruled in part on other grounds in *Bechtold v Morris*, 443 Mich 105, 108-109; 503 NW2d 654 (1993). "The omission of language from one part of a statute that is included in another part should be construed as intentional." *Mericka v Dep't of Community Health*, 283 Mich App 29, 39; 770 NW2d 24 (2009). Ultimately, the court rules must be construed to prevent absurd results, injustice, or prejudice to the public interest. *Hill*, 276 Mich App at 305.

III. AFFIRMATIVE DEFENSES

Plaintiffs argue that the trial court erred in concluding that defendants' demand for a response to their affirmative defenses rendered the affirmative defenses a pleading requiring a response. We agree.

To resolve the question presented here requires us to examine several court rules. MCR 2.108(A)(5) mandates that a party that has been "served with a *pleading* to which a reply is required or permitted may serve and file a reply within 21 days after service of the pleading to which it is directed." (Emphasis added.) Notably, however, what constitutes a "pleading" is limited and exclusively defined as:

> (1) a complaint,
>
> (2) a cross-claim,
>
> (3) a counterclaim,
>
> (4) a third-party complaint,
>
> (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and
>
> (6) a reply to an answer.
>
> *No other form of pleading is allowed.* [MCR 2.110(A) (emphasis added).]

As is clear from the plain language of the rule, affirmative defenses are simply not pleadings for purposes of MCR 2.110(A). *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 255-256; 805 NW2d 217 (2011).

Moreover, MCR 2.110(B) identifies which pleadings a party is required to respond to, and those pleadings only include:

> (1) a complaint,
>
> (2) a counterclaim,
>
> (3) a cross-claim,

(4) a third-party complaint, or

(5) an answer demanding a reply. [MCR 2.110(B).]

Thus, according to the plain language of MCR 2.110(B), affirmative defenses are not pleadings requiring responses.

Defendants argue that affirmative defenses are part of a party's "responsive pleading"—in this case, the answer—albeit under "a separate and distinct heading . . . ." MCR 2.111(F)(3). Defendants contend that since defendants' affirmative defenses were part of their answer and they demanded a reply in the affirmative defenses, their affirmative defenses amounted to an answer demanding a reply. We disagree.

Affirmative defenses are addressed separately in MCR 2.111(F) which states in relevant part:

(2) Defenses Must be Pleaded; Exceptions. A party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim *must assert in a responsive pleading the defenses the party has against the claim.* A defense not asserted in the responsive pleading or by motion as provided by these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted. . . .

* * *

(3) Affirmative Defenses. Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. *Under a separate and distinct heading*, a party must state the facts constituting

(a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of frauds; statute of limitations; immunity granted by law; want or failure of

> consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery;
>
> (b) a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part;
>
> (c) a ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise. [MCR 2.111(F) (emphasis added).]

While affirmative defenses must be addressed within a party's responsive pleadings, they are not synonymous with answers and other pleadings and are defined separately from them within the Michigan Court Rules. MCR 2.110(A), which exclusively defines "pleadings," does not mention affirmative defenses. MCR 2.110(B), which defines pleadings requiring a response, also does not include affirmative defenses demanding a response. In other words, despite the language in MCR 2.111(F)(3) that affirmative defenses should be part of the responsive pleadings, affirmative defenses do not amount to a pleading by themselves nor do affirmative defenses demanding a reply count as a pleading requiring a response.

Even were we to accept defendants' position that affirmative defenses fall within the umbrella of MCR 2.110(A), we would still be constrained to find the trial court erred in deeming the affirmative defenses effectively admitted. MCR 2.111(E)(1) states: "Allegations in a pleading that requires a responsive pleading, other than allegations of the amount of damage or the nature of the relief demanded, are admitted if not denied in the responsive pleading." However, "[a]llegations in a pleading that does not require a responsive pleading are taken as denied." MCR 2.111(E)(2). Based on the plain language of the court rules defining pleadings and responsive pleadings, plaintiffs were not required to

respond to defendants' affirmative defenses, even though defendants demanded a response in them. MCR 2.110(B) exclusively defines pleadings requiring a response and affirmative defenses are not included. Accordingly, plaintiffs' failure to file a response to defendants' affirmative defenses did not amount to a concession regarding the truth of the affirmative defenses under MCR 2.111(E)(1). Alternatively stated, defendants' affirmative defenses demanding a response are not pleadings requiring a response, and the trial court should have taken them as denied.

Defendants argue that *Vannoy v City of Warren*, 15 Mich App 158; 166 NW2d 486 (1968), overruled on other grounds by *DeShambo v Anderson*, 471 Mich 27, 40; 684 NW2d 332 (2004), and *Simonson v Michigan Life Ins Co*, 37 Mich App 79; 194 NW2d 446 (1971), are controlling in this case and stand for the proposition that a failure to respond to affirmative defenses demanding a reply amounts to a concession of the truth of the affirmative defenses. We disagree. *Vannoy* and *Simonson* are not binding on this Court because they were published before 1990. "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990 . . . ." MCR 7.215(J)(1). Moreover, they are distinguishable.

In *Vannoy*, the defendant contended that the failure of the plaintiff to respond to the defendant's affirmative defenses amounted to a concession of the veracity of the affirmative defenses. *Vannoy*, 15 Mich App at 161. However, the defendant in *Vannoy* did not demand a response in its affirmative defenses. *Id*. at 162. As a result, this Court concluded, "An averment in the nature of an affirmative defense does not require a responsive pleading unless it expressly requests a re-

ply." *Id.* at 161. *Vannoy* is distinguishable from this case since the defendant in *Vannoy* did not make a demand for a reply in either the answer or the affirmative defenses. In *Vannoy*, this Court did not address the question we are faced with: whether a demand for a reply in the affirmative defenses and not in the answer requires a responsive pleading. As a result, this Court's conclusion that "an affirmative defense does not require a responsive pleading unless it expressly requests a reply" is merely dicta.

Likewise, in *Simonson*, the defendant pleaded affirmative defenses within his answer. *Simonson*, 37 Mich App at 84. The plaintiff did not respond to all of the defendant's affirmative defenses in his reply to the defendant's answer. *Id.* at 83. The defendant argued that because the plaintiff did not respond to all of the defendant's affirmative defenses in his reply, the plaintiff could not raise any arguments in response to those defenses at trial. *Id.* This Court concluded that since the defendant did not demand a reply to its answer, the plaintiff did not need to file a responsive pleading and could raise a response to the defendant's affirmative defenses at trial. *Id.* at 84. Implicit in the reasoning of this Court in *Simonson* is an assumption that affirmative defenses are synonymous with the answer. However, like *Vannoy*, *Simonson* is distinguishable because this Court in *Simonson* did not address whether a demand for a reply in the affirmative defenses and not in the answer requires a responsive pleading. As a result, we conclude that *Simonson* does not control here.

Because the trial court erred by concluding that plaintiffs were required to reply to defendants' affirmative defenses, the affirmative defenses should not have been deemed admitted. We reverse the trial court's

order granting defendants' motion for summary disposition on that basis and remand to the trial court for further proceedings.

IV. PLAINTIFFS' LATE REPLY

Plaintiffs further argue that the trial court erred when it failed to consider plaintiffs' late response to defendants' affirmative defenses. Given our conclusion that plaintiffs were not required to respond to defendants' affirmative defenses and our reversal of the order granting the motion for summary disposition, we need not address this question because it is moot. *Driver v Naini*, 287 Mich App 339, 355; 788 NW2d 848 (2010). "An issue is moot if an event has occurred that renders it impossible for the court to grant relief." *Attorney General v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

WIGGINS v CITY OF BURTON

Docket No. 293023. Submitted November 4, 2010, at Detroit. Decided February 8, 2011, at 9:05 a.m.

Charles D. and Susan Wiggins brought an action in the Genesee Circuit Court against the City of Burton, William L. and Paula M. Mahler, Thomas A. and Margaret A. Heckman, and others. The Wigginses, the Mahlers, and the Heckmans owned neighboring properties in the City of Burton. The property owned by the Wigginses (the Wiggins property) was in a subdivision that was platted in the 1990s. The subdivision plat indicated that a portion of the Wiggins property was encumbered by a private easement for storm detention. After the subdivision was constructed, the Mahlers and the Heckmans, who lived outside the new subdivision, began to have surface-water drainage problems. In response, the city had a drainage system installed on the Mahler and Heckman properties that led to the storm-detention easement on the Wiggins property. The Wigginses alleged that the construction of the drain on their property and the resultant flow of water onto their property from the drainage system constituted a trespass and a nuisance and that the city had taken their property without just compensation. The Wigginses sought money damages, declaratory relief, and to quiet title to their property. The court, Geoffrey L. Neithercut, J., granted summary disposition in favor of the Mahlers and the Heckmans and dismissed the Wigginses' claims against the city without prejudice. The Wigginses appealed, and the city cross-appealed.

The Court of Appeals *held*:

1. The plain language of the plat indicated that the scope of the easement on the Wiggins property was limited to storm detention, meaning the detention of waters that naturally flowed to the land as a result of storms. The installation of the drain on the Wiggins property fell outside the scope of the easement. Because the drain was a tangible object, its presence was actionable in trespass rather than nuisance. Although the Mahlers and the Heckmans did not personally enter the Wiggins property, their requests for drainage relief from the city and their subsequent authorization for the city or its agents to construct the drainage system were sufficient acts to give rise to liability. Accordingly, the installation

and continuing presence of the drain on the Wiggins property constituted a trespass by the Mahlers and the Heckmans. The Wigginses were entitled to nominal damages, any actual damages, and injunctive relief enjoining the Heckmans' and the Mahlers' use of the drainage system and requiring them to remove that portion of the drainage system that encroached on the Wiggins property.

2. Although the Wigginses' request for declaratory relief was incorrectly pleaded as a separate cause of action rather than as a prayer for relief, the circuit court erred by failing to consider the request as it related to the Heckmans and the Mahlers. The Wigginses were minimally entitled to a declaration that the installation and construction of the drain on their property exceeded the scope of the storm-detention easement encumbering that property and that the Heckmans and the Mahlers committed a trespass by authorizing or ratifying the city's construction of the drain.

3. The circuit court properly declined to consider the Wigginses' quiet-title claim as it related to the Heckmans and the Mahlers because the Wigginses' complaint asserted their quiet-title claim against the city only, not against the Heckmans or the Mahlers.

4. The natural flow of surface water from an upper, dominant estate forms a natural servitude that encumbers a lower, servient estate. However, the owner of the upper estate may not increase the amount or concentrate the flow of water onto the servient estate. In this case, there remained a genuine issue of material fact concerning whether the flow of water onto the Wiggins property, as distinct from the construction of the drain itself, constituted an actionable trespass by increasing the amount of surface water that naturally flowed to the Wiggins property. If the flow of surface water onto the Wiggins property was materially increased, then the Heckmans and the Mahlers would also be liable for this additional trespass because they authorized the construction of the drain, entitling the Wigginses to at least nominal damages, and injunctive and declaratory relief.

5. The circuit court erred by dismissing the Wigginses' claims against the city on the basis of MCL 280.75, which did not apply under the particular circumstances of this case. The procedures set forth in MCL 280.75 apply only to proposed drains and not to drains that are already in existence.

6. There remained a genuine issue of material fact concerning whether the city's installation of the drain on the Wiggins property constituted a taking of the Wigginses' property without just

compensation. The construction and installation of the drain was an affirmative act directed at the Wigginses' property by the city that had the effect of limiting the use of the Wigginses' property, but it was not clear how much damage was caused by the installation of the drain and whether the city's actions were a substantial cause of a decline in the value of the property. If the installation of the drain on the Wiggins property was a substantial cause of a decline in the value of the Wiggins property, the Wigginses would be entitled to compensation.

7. Because of its erroneous reliance on MCL 280.75, the circuit court did not address the question of the city's entitlement to governmental immunity with regard to the Wigginses' tort claims. On remand, the circuit court must determine whether the city is entitled to governmental immunity with respect to the Wigginses' tort claims.

Affirmed in part, reversed in part, and remanded for further proceedings.

1. PROPERTY — EASEMENTS — SCOPE — DETERMINATION — PLAIN MEANING — STORM-DETENTION EASEMENTS — DRAINS.

To determine the scope of an express easement, courts should first look to the language of the easement itself; when that language is clear it must be enforced as written; an express easement for storm detention is limited to the detention of waters that naturally flow to the easement as a result of storms; the installation of a drainage system to carry surface water to a storm-detention easement falls outside the scope of the express easement when the easement does not include language relating to the installation of pipes or drains.

2. TRESPASS — JOINT TORTFEASORS — AUTHORIZATION OF THE TRESPASS.

All persons who instigate, command, encourage, advise, ratify, or condone the commission of a trespass are cotrespassers and are jointly and severally liable as joint tortfeasors; a property owner who requests drainage relief from a city and authorizes the construction of a drainage system by the city, the installation of which constitutes a trespass on another's land, may be held liable for the trespass even though he or she did not personally set foot on the property.

3. PROPERTY — DRAINAGE — SURFACE WATERS — NATURAL SERVITUDES — INCREASING THE FLOW OR CONCENTRATION OF SURFACE WATERS ONTO A SERVIENT ESTATE — TRESPASS.

The natural flow of surface water from an upper, dominant estate forms a natural servitude that encumbers a lower, servient estate,

but the owner of the upper estate may not increase the amount or concentrate the flow of water onto the servient estate; a person who increases the flow of water from an upper estate onto a lower estate may be held liable for trespass.

4. DRAINS — DRAIN CODE — APPLICABILITY — ESTABLISHED DRAINS.

Chapter 4 of the Drain Code concerns the procedures applicable to proposed drains rather than established drains (MCL 280.71 *et seq.*).

Fausone Bohn, *LLP* (by *Christopher S. Frescoln*), for Charles D. and Susan Wiggins.

Plunkett Cooney (by *Mary Massaron Ross*, *Audrey J. Forbush*, and *Hilary A. Ballentine*) for the city of Burton.

Raftery, *Janeczek & Hoelscher*, *P.C.* (by *Jeanne V. Barron* and *James J. Raftery*), for William L. and Paula M. Mahler.

Michael J. Mangapora, *P.C.* (by *Rex A. Ziebarth*), for Thomas A. and Margaret A. Heckman.

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM. Plaintiffs Charles D. Wiggins and Susan Wiggins (the Wiggins) appeal by right the circuit court's order denying their motion for summary disposition, granting summary disposition in favor of defendants William L. Mahler and Paula M. Mahler (the Mahlers), granting summary disposition in favor of defendants Thomas A. Heckman and Margaret A. Heckman (the Heckmans), and dismissing all claims against the city of Burton (the City) "without prejudice so that the [Wiggins] and the City . . . can follow the procedure . . . laid out in MCL 280.75." The City cross-appeals the same circuit court order. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

The dispute in this case involves the issue of surface-water drainage on three neighboring parcels of real property located in the City. The Heckmans have lived at 5217 Maple Avenue and the Mahlers have lived at 5245 Maple Avenue for some time. A subdivision known as Maplewood Meadows No. 1 was laid out and platted, apparently in the mid-1990s. Maplewood Meadows No. 1 lies to the east of the Heckman parcel and the Mahler parcel and abuts both parcels along portions of their eastern property lines.

The Wiggins purchased Lot 51 in Maplewood Meadows No. 1, commonly known as 5257 Walnut Drive, on December 19, 2003. A warranty deed executed on December 19, 2003, conveyed Lot 51 to the Wiggins "[s]ubject to all existing building and use restrictions, easements and zoning ordinances, if any." As shown on the final plat of Maplewood Meadows No. 1, a large section of the Wiggins parcel (more specifically, the west and north sides of Lot 51) is encumbered by a "PRIVATE EASEMENT FOR STORM DETENTION."[1] This "storm detention" easement encumbers portions of four other adjoining lots in the subdivision as well. According to the parties, there is no granting instrument creating or relating to the storm-detention easement other than the final plat itself. The Wiggins admit that they were aware of the storm-detention easement encumbering the west and north sides of lot 51 when they purchased the parcel in 2003.

The Heckmans and Mahlers assert that the construction of Maplewood Meadows No. 1 caused significant

[1] While it seems that the word "retention" would have been more appropriate than the word "detention" in this context, the word "detention" is used on the subdivision's final plat and has been used by the parties throughout the pendency of this case.

surface-water drainage problems on their respective parcels. Specifically, the City and the Mahlers contend that before the construction of Maplewood Meadows No. 1, the surface waters historically and naturally ran away from the Heckman and Mahler parcels, and toward the area now encumbered by the storm-detention easement. The City has offered a hydrogeologic contour map to support this contention. The City and the Mahlers contend that the construction of Maplewood Meadows No. 1 reversed this historic flow of surface water, causing the surface waters to begin flowing *toward* the Heckman and Mahler parcels.

Thomas Heckman apparently lodged several complaints with the City concerning this surface-water drainage problem, dating as far back as June 1995. The minutes of the Burton City Council indicate that Mr. Heckman appeared before the council on several occasions to complain about the "flooding problems on his property." On May 21, 2007, the Burton City Council voted 5 to 1 to approve the expenditure of $1,750.00 to pay for a "relief drain project at 5245 Maple and 5217 Maple Ave[nue]." The City's plan was to install individual drains on the Heckman and Mahler parcels, and to connect these individual drains to the area of the existing storm-detention easement on the Wiggins parcel by way of a 180-foot drainage pipe.

In May 2007, the Heckmans and Mahlers signed documents with the City acknowledging that the City would construct and install drains on their respective properties and that the drainage project, when completed, would "belong solely to the [Heckmans and Mahlers] and will be the [Heckmans' and Mahlers'] responsibility to maintain/repair." Subsequently, the City contracted with Doan Enterprises, Inc. to complete the proposed drainage project. In late 2007, Doan

Enterprises excavated a ditch, installed drains on the Heckman and Mahler parcels, and laid pipe connecting these drains to the area of the storm-detention easement on the Wiggins property. The practical effect of this drainage project was to carry the accumulated surface waters away from the Heckman and Mahler parcels and to deposit those waters in the Wiggins' backyard.

In March 2008, the Wiggins filed a five-count complaint in the Genesee Circuit Court, setting forth claims entitled "QUIET TITLE" (count 1), "DECLARATORY RELIEF" (count 2), "TRESPASS" (count 3), and "NUISANCE" (count 4) against the City, the Mahlers, the Heckmans, Doan Enterprises, and certain agents of the City.[2] The Wiggins also set forth a claim of inverse condemnation (count 5) against the City only. The Wiggins sought both money damages and injunctive, declaratory, and equitable relief. Paragraph 35 of the complaint, which captured the essence of the Wiggins' grievances, alleged that the City had

> excavated a drainage trench that originated from the Mahler Property and ran in a northerly direction from the Mahler Property in a relatively straight line through the Heckman Property on the eastern edge of the Heckman Property . . . and continued the excavation in a northerly direction in a straight line on the Heckman Property along the eastern edge of the Heckman Property proximate to the area where the Heckman Property borders the Wiggins Property for a distance of approximately thirty (30) feet, at which point [the City] then redirected the trench at an approximate 45-degree angle and entered into and upon the Wiggins Property and continued its excavation of the trench, removing sod, turf and soil from the Wiggins Property, and terminated the trench approximately in the

[2] Doan Enterprises and the named agents of the City have been dismissed from the case and are not involved in the instant appeal.

> middle of the Wiggins' backyard immediately adjacent to their childrens' [sic] swing set.

The Wiggins alleged that neither the City, nor the Heckmans, nor the Mahlers, nor Doan Enterprises, nor any of the City's agents had ever sought permission to enter onto their property, to excavate the ditch, or to lay the drainage pipe. The Wiggins also alleged that

> [t]he [e]ffect of the project . . . was . . . an alteration and diversion of the natural flow of the surface water from the Heckman Property and the Mahler Property, causing an intentionally focused, increased and concentrated flow of the surface water from those properties directly onto the Wiggins Property, causing significant damages thereby.

The Wiggins asserted that none of the defendants had been authorized to enter onto their property, to excavate the ditch, or to lay the drainage pipe in question. The Wiggins alleged that since the City's construction of the drainage system, a substantially increased amount of water had begun to flow onto their property and that a permanent "retention pond" had formed in their backyard.

In count 1, the Wiggins sought an order quieting title to their property. The Wiggins acknowledged the existence of the storm-detention easement that encumbered the west and north sides of their parcel, but emphasized that they remained the fee owners of the property. The Wiggins contended that by constructing the drainage system, the City (and presumably the other named defendants) had asserted property interests adverse to their own. The Wiggins claimed that by asserting such adverse claims, the City and other named defendants had jeopardized and interfered with their interests in the property. The Wiggins asked the circuit court to quiet title in them.

In count 2, the Wiggins sought declaratory relief relating to the rights of the named defendants and the scope and extent of the existing storm-detention easement. The Wiggins requested a declaration that none of the named defendants had possessed any right to enter onto the Wiggins parcel, to excavate the trench on the Wiggins parcel, or to install the drainage pipe in question.

In count 3, the Wiggins alleged that the named defendants had trespassed on their property in two different ways. First, the Wiggins alleged that the City, Doan Enterprises, and the City's agents had physically trespassed on their property to excavate the ditch and install the drainage pipe. The Wiggins contended that the Heckmans and Mahlers had either specifically agreed to, or acquiesced in, this act of trespassing. Second, the Wiggins alleged that the City, the Heckmans, and the Mahlers had committed additional acts of trespass by improperly diverting surface waters onto the Wiggins parcel through the drainage pipe. The Wiggins sought an injunction requiring the removal of the drainage pipe and enjoining the further diversion of surface water onto their property. The Wiggins also sought money damages for the alleged trespasses that had already been committed.

In count 4, the Wiggins alleged that the presence of the drainage pipe and the diversion of surface water onto their property were conditions that unreasonably interfered with their use and enjoyment of the property. They asserted that these conditions constituted a nuisance. The Wiggins sought money damages as well as abatement of the alleged nuisance under MCL 600.2940.

Lastly, in count 5, the Wiggins claimed that the City's actions had resulted in an unconstitutional taking of a portion of their property without just compensation.

In December 2008, the circuit court granted the Wiggins leave to file a "Supplemental Complaint." In their supplemental complaint, the Wiggins clarified that they were asserting their trespass claim against the Heckmans and Mahlers, as well as the City. The Wiggins also clarified their argument that even though the Heckmans and Mahlers had not physically entered onto the Wiggins parcel, they were nonetheless liable for trespass because they had authorized the diversion of surface waters from their properties.

On April 20, 2009, the Mahlers filed a "MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO MONEY DAMAGES" pursuant to MCR 2.116(C)(10). The Mahlers asserted that their *only* involvement with this entire case had been their act of giving the City permission to enter upon the Mahler parcel to construct a drain. Curiously, the Mahlers' sole legal argument was that the Wiggins had not established a prima facie case of negligence against them. However, as noted previously, the Wiggins never pleaded a claim of negligence against the Mahlers.[3]

Also on April 20, 2009, the City filed its own motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Among other things, the City argued that the Wiggins' claims should be dismissed "because the Office of the Genesee County Drain Commissioner approve[d] of the placement of the drainage pipe" and because the Wiggins' claims were "barred by governmental immunity." The City argued that the construction of the drainage pipe on the Wiggins parcel and the diversion of excess surface waters from the Heckman

[3] Three days later, the Heckmans filed their own "motion for partial summary disposition as to money damages" pursuant to MCR 2.116(C)(10), adopting and fully concurring in the motion filed by the Mahlers.

and Mahler parcels were both within the scope of the preexisting storm-water-detention easement that encumbered the Wiggins' property. The City further pointed out that the Wiggins were fully aware of the storm-detention easement encumbering their parcel at the time they purchased it. Accordingly, the City contended that the Wiggins had no right to complain about the construction of the drain or the diversion of surface water onto their property, both of which were within the contemplation of the parties at the time the Wiggins bought the property.

The City additionally argued that, pursuant to § 192 of the Land Division Act, MCL 560.192, the drainage of storm water in a subdivision is within the exclusive jurisdiction and control of the county drain commissioner. The City asserted that because the Genesee County Drain Commissioner had approved the creation of the storm-water-detention easement at the time Maplewood Meadows No. 1 was first platted, and because the Genesee County Drain Commissioner had also approved the construction of the drain leading from the Heckman and Mahler parcels to the Wiggins parcel, the Wiggins' claims against the City should all fail as a matter of law.[4]

With respect to the Wiggins' quiet-title claim, the City argued that the claim was in reality an attempt to revise a recorded plat. According to the City, because the Wiggins had not proceeded in accordance with certain requirements set forth in the Land Division Act, MCL 560.101 *et seq*., their mislabeled quiet-title claim

[4] The Mahlers filed a motion partially concurring in the City's motion for summary disposition. The Mahlers agreed with the City's contention that the Wiggins' claims should fail as a matter of law because the drainage project at issue in this case had been approved by the Genesee County Drain Commissioner.

should be dismissed. And with regard to the Wiggins' trespass and nuisance claims, the City argued that they should be dismissed on the basis of governmental immunity. The City asserted that by constructing the drain to divert excess surface water from the Heckman and Mahler parcels, it had been engaged in the exercise of a governmental function within the meaning of § 7 of the governmental tort liability act (GTLA), MCL 691.1407(1). The City also pointed out that the Michigan Supreme Court had abolished the common-law trespass-nuisance exception to governmental immunity in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002).

The Wiggins responded to defendants' motions for summary disposition and requested summary disposition in their favor pursuant to MCR 2.116(I)(2). The primary argument raised by the Wiggins was that although the storm-detention easement encumbering their property required them to accept the surface waters that naturally flowed into the area of the easement, defendants had possessed no right to construct the drain at issue in this case, which artificially increased and concentrated the amount of water flowing onto the Wiggins parcel.

The Wiggins pointed out that the Heckmans' and Mahlers' motions addressed the issue of "negligence" only, but that no negligence claim had ever been pleaded against any of the defendants. The Wiggins noted that the Mahlers and Heckmans had not even addressed the trespass, nuisance, and quiet-title claims in their motions for partial summary disposition. With regard to the City's motion for summary disposition, the Wiggins argued that the drainage pipe constructed by the City was *not* within the scope of the preexisting storm-detention easement. The Wiggins acknowledged that

the area encumbered by the storm-detention easement was required to receive the natural surface runoff from the neighboring parcels, but argued that none of the defendants was authorized to artificially increase and concentrate the flow of surface water through the use of pipes or drains. The Wiggins contended that, in light of the plain language creating the easement on the final plat of Maplewood Meadows No. 1, "[t]he scope of the private easement for storm detention was . . . limited to the accommodation of surface water matriculating to the detention basin by only natural means and courses." The Wiggins also asserted that the City had improperly failed to comply with the Drain Code, MCL 280.1 *et seq*., when it undertook to construct the drain at issue in this case. The Wiggins noted that they had no objection to the Heckmans and Mahlers obtaining some type of drainage relief for their flooding problems in general, but asserted that the City had provided drainage relief for the Heckmans and Mahlers in an unlawful manner by diverting all the surface water from the Heckman and Mahler properties to the Wiggins property.

In reply, and without any supporting authority, the City argued that the storm-detention easement encumbering the Wiggins parcel fell within the definition of "drain" contained in § 3 of the Drain Code, MCL 280.3. The City also contended that the storm-sewer plan for Maplewood Meadows No. 1 supported its position that the storm-detention easement was required to accept all surface-water runoff from the Heckman and Mahler parcels. The City pointed out that, at the time Maplewood Meadows No. 1 was initially platted, the plattors apparently intended to drain all surface waters collected in the area of the storm-detention easement into the subdivision's storm sewers. The City submitted a map of the originally proposed storm-sewer plan for

Maplewood Meadows No. 1.[5] The City contended that the subdivision's storm-sewer plan, which envisioned a drain leading from the area of the storm-detention easement to the storm sewers, belied the Wiggins' argument that the installation of a drainage system was not within the scope of the storm-detention easement.

The City then argued that the drain at issue in this case had not increased the historical and natural flow of water from the Heckman and Mahler parcels to the Wiggins parcel. The City contended that, in the state of nature, all surface waters had historically flowed from the Heckman and Mahler parcels to the Wiggins property. According to the City, however, the construction of Maplewood Meadows No. 1 had somehow altered this historical and natural flow of surface waters, causing the surface waters to stop flowing from the Heckman and Mahler parcels, and instead to begin collecting on those parcels. The City argued that the installation of the drain leading to the Wiggins parcel had merely reestablished the historical and natural flow of surface waters into the area of the storm-detention easement, and that "from a hydrologic standpoint, the surface water from the Heckman and Mahler properties is currently going where it historically went."

The circuit court held a hearing on the parties' motions for summary disposition. The City argued that it was entitled to governmental immunity with respect to the Wiggins' claims. The circuit court noted that the Wiggins had also pleaded an eminent-domain claim, and that the City would not be entitled to immunity with regard to this takings claim. The court looked to

[5] It is not clear whether the proposed storm sewers were ever constructed in Maplewood Meadows No. 1 or whether the storm-detention easement was ever connected to the subdivision's storm sewers as apparently intended by the plattors.

the dictionary definitions of the words "drain" and "retain" and observed that the two words had two different meanings. The court then remarked that it had read the Drain Code, but that the words "retain" and "retention" are not contained in the statute. The court questioned aloud whether the drain at issue in this case was governed by the Drain Code or within the jurisdiction of the county drain commissioner. The City's attorney commented that the drain commissioner had approved the creation of the storm-detention easement at the time he signed off on the final plat of Maplewood Meadows No. 1.[6] Therefore, according to the City, the storm-detention easement was part of the subdivision's overall drainage system and under the jurisdiction of the drain commissioner.

The circuit court posed a question to counsel for the City:

> What about the argument that . . . [w]hen the [d]etention easement was created, that it dealt with a natural flow, that which by the hands of Mother Nature and God would run into that basin, whereas now by man's act a pipe has been run into the basin creating more water than originally designed . . . ?

The City's attorney responded, "[F]irst of all, according to the contour map of the area prior to the construction of this subdivision, the water's going now where it naturally went; so, from a historical perspective, [the water] has not been diverted." The court agreed that "[t]here is a natural flow that's suggested in that topographical map," but noted that the Wiggins parcel "accepted that natural flow and everything was appropriate and understood until suddenly a pipe was put in.

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[6] The county drain commissioner or governing body of the municipality must give final approval before the plat of a subdivision may be finalized and recorded. MCL 560.192.

Now, if the flow increases two or three years after [the Wiggins] move onto the property, that suggests that it's not the natural flow." The City's attorney responded that the Wiggins could not prove that the flow of water onto their property had been increased by the installation of the drain.

The Mahlers' attorney argued that her clients could not be held liable for trespass or nuisance because they had not entered upon the Wiggins property. She argued that the Mahlers had merely authorized or consented to the City's construction of the drain. She did not believe that this was sufficient to create liability on the part of her clients. The Heckmans' attorney made essentially the same argument.

The Wiggins' attorney argued that "when this easement was established there was never any intention that there was to be a drain installed where they ultimately installed it[.]" The Wiggins' attorney went on to argue that

> when the drain commissioner . . . approved the plat and when the people from the City of Burton approved the plat, the intention was, in fact, that this private easement for storm detention would accommodate the natural flow of water through the drainage system which is . . . evident within the plat itself.

The Wiggins' attorney fully admitted that his clients' parcel was encumbered by the "private easement for storm detention" shown on the final plat of Maplewood Meadows No. 1, but argued that the City and other defendants were attempting to unilaterally expand the scope of the easement from a storm-water-detention easement to a drainage easement. Counsel argued that such a unilateral expansion of the scope of the easement was impermissible and not within the contemplation of the parties at the time the easement was created. The

Wiggins' attorney concluded that "the existence of a detention [easement] does not give rise to the authority to install a drain."

After entertaining the attorneys' arguments, the circuit court announced that it had discovered § 75 of the Drain Code, MCL 280.75, during its research. The court read aloud from MCL 280.75, which provides in pertinent part:

> If all persons whose lands would be traversed or damaged by the proposed drain or drains shall not have executed a release of the right of way, and all damages on account thereof, within 60 days after the entry of the first order of determination, the commissioner shall, as soon as practicable, make application to the probate court of the county in which such lands are situated, for the appointment of 3 special commissioners, who shall be disinterested resident freeholders of the county, but not of the township or townships affected by such drain, to determine the necessity for the taking of private property for the use and benefit of the public, and the just compensation to be made therefor.

The circuit court asked the parties whether they had followed the procedures set forth in MCL 280.75. The parties confirmed that they had not. Counsel for the City asserted that the procedures set forth in MCL 280.75 were inapplicable to this case. She also asserted that because of Thomas Heckman's repeated complaints at city council meetings, the City was required to act quickly to resolve the drainage problem. Counsel suggested that the City would not have had time to follow the statutory procedures set forth in MCL 280.75. But the circuit court maintained that the procedures set forth in MCL 280.75 should have been followed before the drain was installed. The circuit court took the motions under advisement.

On June 29, 2009, the circuit court issued an opinion and order (1) granting summary disposition in favor of the Mahlers and the Heckmans, (2) denying the Wiggins' motion for summary disposition, and (3) dismissing all claims against the City "without prejudice so that the [Wiggins] and the City . . . can follow the procedure . . . laid out in MCL 280.75." With regard to the Heckmans and Mahlers, the circuit court determined that their only affirmative act had been a request for drainage relief from the City. The court noted that neither the Heckmans nor the Mahlers had personally trespassed on the Wiggins parcel. The court ruled that "merely requesting relief from a city is not sufficient to rise to the level of trespass or nuisance," and therefore dismissed all claims against the Heckmans and Mahlers. With respect to the City, the circuit court assumed for the sake of argument that the storm detention easement encumbering the Wiggins parcel was "in actuality a drain easement." However, relying on § 6 of the Drain Code, MCL 280.6, and *Toth v Waterford Twp*, 87 Mich App 173; 274 NW2d 7 (1978), the court observed that a local unit of government may not significantly expand the scope of an existing drainage easement. The court noted that there appeared to remain a factual dispute concerning whether the City had the authority to expand the scope of the existing easement.

Nevertheless, the court went on to dispose of the Wiggins' claims against the City on the basis of MCL 280.75, even though that statute had never been raised by the parties. The court stated that MCL 280.75 "specifically lays out the procedure an aggrieved landowner is to use in a circumstance such as ours[.]" In the end, the court "dismisse[d] the case against the City without prejudice so that the [Wiggins] and the City can follow the procedure as laid out in MCL 280.75."

The Wiggins timely filed a claim of appeal following the circuit court's ruling. The City has filed a claim of cross-appeal.

II. STANDARDS OF REVIEW

The scope and extent of an easement is generally a question of fact that is reviewed for clear error on appeal. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005); *Dobie v Morrison*, 227 Mich App 536, 541-542; 575 NW2d 817 (1998). Similarly, whether the scope of an easement has been exceeded is generally a question of fact. See *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928). However, when reasonable minds could not disagree concerning these issues, they should be decided by the court on summary disposition as a matter of law. See *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). This Court reviews de novo a circuit court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

III. CLAIMS AGAINST THE HECKMANS AND MAHLERS PERTAINING TO THE PHYSICAL DRAIN ITSELF

The Wiggins first challenge the circuit court's dismissal of their claims against the Heckmans and Mahlers pertaining to the construction and continuing presence of the drain itself. The Wiggins argue that the installation and physical presence of the drainpipe on their property constituted a trespass and a nuisance. The Wiggins assert that by authorizing or ratifying the City's installation of the drain, the Heckmans and Mahlers committed the torts of trespass and nuisance. The Wiggins also assert that the Heckmans and Mahl-

ers, through their actions, have asserted property interests adverse to their own. We consider these arguments in turn.

A. TRESPASS AND NUISANCE

The Wiggins first contend that the installation, construction, and continuing presence of the physical drainpipe itself constitute a trespass and nuisance for which the Heckmans and Mahlers are liable. We agree that the installation and continuing presence of the drain constitute a trespass, but we find that they do not constitute a nuisance.

The language of an express easement is interpreted according to rules similar to those used for the interpretation of contracts. See *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003); *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 283 Mich App 115, 129-130; 770 NW2d 359 (2009), rev'd in part on other grounds 488 Mich 69 (2010). Accordingly, in ascertaining the scope and extent of an easement, it is necessary to determine the true intent of the parties at the time the easement was created. *Hasselbring v Koepke*, 263 Mich 466, 477-478; 248 NW 869 (1933). Courts should begin by examining the plain language of the easement, itself. *Little*, 468 Mich at 700. If the language of the easement is clear, "it is to be enforced as written and no further inquiry is permitted." *Id*. A party's use of the servient estate "must be confined strictly to the purposes for which [the easement] was granted or reserved," *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957), and "must be confined to the plain and unambiguous terms of the easement," *Dyball v Lennox*, 260 Mich App 698, 708; 680 NW2d 522 (2004). The scope of an easement encompasses only those burdens

on the servient estate that were contemplated by the parties at the time the easement was created. *Bang*, 244 Mich at 576.

The language used in a plat is subject to similar rules of interpretation. "When interpreting . . . plats, Michigan courts seek to effectuate the intent of those who created them." *Tomecek v Bavas*, 482 Mich 484, 490-491; 759 NW2d 178 (2008) (opinion by KELLY, J.). "The intent of the plattors must be determined from the language they used and the surrounding circumstances." *Thies v Howland*, 424 Mich 282, 293; 380 NW2d 463 (1985). As occurred in the present case, an easement may be created by a subdivision plat. *Jeffery v Lathrup*, 363 Mich 15, 21-22; 108 NW2d 827 (1961); see also *Kirchen v Remenga*, 291 Mich 94, 108; 288 NW 344 (1939); 1 Cameron, Michigan Real Property Law (3d ed), § 6.7, p 220. The designation of an easement on a properly recorded plat "ha[s] all the force and effect of an express grant." *Kirchen*, 291 Mich at 109; see also *Forge v Smith*, 458 Mich 198, 209 n 29; 580 NW2d 876 (1998).

As noted earlier, and as shown on the final plat of Maplewood Meadows No. 1, the easement that encumbers portions of the Wiggins parcel and the four other adjacent lots is described as a "PRIVATE EASEMENT FOR STORM DETENTION." In other words, according to the plain language of the plat, the scope of the easement is limited to storm detention. We conclude that the language of this easement is clear and unambiguous, *Little*, 468 Mich at 700, and does not include within its scope the installation of the drain or drainpipe at issue in this case. The language of the storm-detention easement plainly limits the permissible uses of the servient estate to the retention or detention of waters that naturally flow to it as a result of storms. And while it could be argued that the surface water

diverted to the servient estate by way of the drain naturally falls on the Heckman and Mahler parcels as a result of storms, the text of the easement simply does not include any language relating to the installation of pipes or drains. See *Schmidt v Eger*, 94 Mich App 728, 738-739; 289 NW2d 851 (1980). If the plattors had desired to include within the scope of the easement the installation of pipes or drains leading onto the servient estate, they certainly could have included language to that effect in the easement at the time it was created. However, they did not. See *Jackson Community College Classified & Technical Ass'n, MESPA v Jackson Community College*, 187 Mich App 708, 714; 468 NW2d 61 (1991); *Montgomery v Taylor & Gaskin, Inc*, 47 Mich App 269, 275; 209 NW2d 472 (1973).

We find support for our conclusion in *Schmidt*. In that case, a drainage ditch carried surface-water runoff from the dominant estate onto the servient estate. *Schmidt*, 94 Mich App at 730-731. When the proprietors of the servient estate announced their intention to grade and level the portion of their property where the drain was located, the owner of the dominant estate sued, arguing among other things that the servient estate was encumbered by a drainage easement. *Id*. at 731, 738. The owner of the dominant estate pointed out that the instruments conveying the servient estate had contained "general language conveying [the servient estate] subject to easements reserved to the [the owner of the dominant estate] . . . ." *Id*. at 738. He argued that the express easements created by these instruments included within their scope the right to maintain the drainage ditch and to continue draining water onto the servient estate. *Id*.

However, the *Schmidt* Court rejected this argument, noting that the language of the express easements had

not even addressed the drain at issue in that case. *Id*. at 738-739. Indeed, the Court observed that while the instruments conveying the servient estate had "listed several specifically defined easements that were reserved to [the owner of the dominant estate]," the instruments of conveyance had "made no mention of the drain which is the subject of this appeal." *Id*. Accordingly, the *Schmidt* Court held that the continued operation and maintenance of the drainage ditch exceeded the scope of the easements.

As in *Schmidt*, the express storm-detention easement in this case "made no mention of the drain" in question. *Id*. Nor did the storm detention easement contain any other language relating to the issue of drainage in general. The plattors of Maplewood Meadows No.1 certainly could have included language relating to the issue of drainage in the text of the easement at the time it was created, but they did not. As explained previously, use of the servient estate "must be confined strictly to the purposes for which [the easement] was granted or reserved," *Delaney*, 350 Mich at 687, and "must be confined to the plain and unambiguous terms of the easement," *Dyball*, 260 Mich App at 708. Moreover, the scope of an easement encompasses *only* those burdens on the servient estate that were within the contemplation of the parties at the time the easement was created. *Bang*, 244 Mich at 576. We conclude that it is beyond factual dispute that the physical drain and drainpipe at issue in this case exceeded the scope of the "PRIVATE EASEMENT FOR STORM DETENTION" as delimited by the plain language of the easement itself. See *Schmidt*, 94 Mich App at 738-739.

The right to exclude others from one's property and the right to enjoy one's property are two distinct

possessory interests, "violations of which give rise to the distinct causes of action respectively of trespass and nuisance." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 58-59; 602 NW2d 215 (1999). "Historically, '[e]very unauthorized intrusion upon the private premises of another is a trespass . . . .' " *Id.* at 60 (alteration in original), quoting *Giddings v Rogalewski*, 192 Mich 319, 326; 158 NW 951 (1916). "Because a trespass violated a landholder's right to exclude others from the premises, the landholder could recover at least nominal damages even in the absence of proof of any other injury." *Adams*, 237 Mich App at 60. "Recovery for nuisance, however, traditionally required proof of actual and substantial injury. Further, the doctrine of nuisance customarily called for balancing the disturbance complained of against the social utility of its cause." *Id*. In other words, " '[t]respass was liability-producing regardless of the degree of harm the invasion caused, while nuisance required substantial harm as a liability threshold.' " *Id*. at 60 n 9 (citation omitted).

In certain jurisdictions, "it has become difficult to differentiate between trespass and nuisance" because "the line between trespass and nuisance has become 'wavering and uncertain.' " *Id*. at 64 (quotation marks and citations omitted). However, this Court has recognized a desire to "preserve the separate identities of trespass and nuisance." *Id*. at 65. Thus, in Michigan, "[r]ecovery for trespass to land . . . is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Id*. at 67. "Once such an intrusion is proved, the tort has been established, and the plaintiff is presumptively entitled to at least nominal damages." *Id*. In contrast, "[w]here the possessor of land is menaced by noise, vibrations, or ambient dust, smoke, soot, or fumes, the

possessory interest implicated is that of use and enjoyment, not exclusion, and the vehicle through which a plaintiff normally should seek a remedy is the doctrine of nuisance." *Id*. Unlike in the case of trespass, "[t]o prevail in nuisance, a possessor of land must prove *significant harm* resulting from the defendant's *unreasonable interference* with the use or enjoyment of the property." *Id*.

Turning to the present case, because the installation of the drain on the Wiggins parcel exceeded the scope of the storm-detention easement, it was necessarily "unauthorized." See *id*. Moreover, the installation of the drain was unquestionably a "direct . . . intrusion of a physical, tangible object" onto the Wiggins parcel. *Id*. Therefore, the installation of the drain on the Wiggins parcel constituted a trespass to property. *Id*.; see also *Schadewald v Brulé*, 225 Mich App 26, 40; 570 NW2d 788 (1997) (observing that "[a]ctivities by the owner of the dominant estate that go beyond the reasonable exercise of the use granted by the easement may constitute a trespass to the owner of the servient estate"). And because the drain at issue in this case constituted a tangible object, its presence on the Wiggins parcel was actionable in trespass rather than in nuisance. *Adams*, 237 Mich App at 69. In sum, it is beyond genuine factual dispute that the continuing presence of the drain itself—the installation of which plainly exceeded the scope of the storm-detention easement—constituted a trespass but not a nuisance under Michigan law.

Having concluded that the installation and presence of the drain on the Wiggins parcel constituted a continuing trespass (but not a nuisance) under Michigan law, it is necessary to determine whether the Heckmans and Mahlers may be held liable for this trespass and

what form of relief is available to the Wiggins. For the reasons that follow, we conclude that the Heckmans and Mahlers are liable in trespass for the unauthorized installation of the drain on the Wiggins parcel. The Wiggins may collect at least nominal damages from the Heckmans and Mahlers, and are additionally entitled to injunctive relief enjoining the Heckmans' and Mahlers' continuing trespass.

The circuit court observed that the Heckmans and Mahlers had not constructed the drain themselves and had not personally set foot on the Wiggins parcel. Instead, the circuit court noted, the Heckmans and Mahlers simply requested drainage relief from the City. The court ruled that "merely requesting relief from a city is not sufficient to rise to the level of trespass," and therefore granted summary disposition in favor of the Heckmans and Mahlers with respect to the trespass claim. We conclude that this ruling was in error. The Heckmans' and Mahlers' requests for drainage relief from the City, and subsequent authorization for the City or its agents to construct the drain in question, were sufficient acts to give rise to trespass liability. "It is a well-established principle of law that all persons who instigate, command, encourage, advise, ratify, or condone the commission of a trespass are cotrespassers and are jointly and severally liable as joint tortfeasors." *Kratze v Indep Order of Oddfellows*, *Garden City Lodge*, 190 Mich App 38, 43; 475 NW2d 405 (1991) (*Kratze I*), rev'd in part on other grounds 442 Mich 136 (1993); see also *Oyler v Fenner*, 264 Mich 519, 521; 250 NW 296 (1933); 87 CJS, Trespass, § 28, pp 744-745. It is beyond factual dispute that the Heckmans and Mahlers specifically requested drainage relief from the City and either authorized or subsequently ratified the installation of the drain and drainpipe by the City or its agents. This conduct by the Heckmans and Mahlers was sufficient to

constitute the intentional tort of trespass. *Kratze I*, 190 Mich App at 43. Moreover, the circuit court wholly disregarded the fact that the drain, once constructed and installed, belonged to the Heckmans and Mahlers rather than to the City. Indeed, as noted previously, the Heckmans and Mahlers signed documents with the City acknowledging that after the City had constructed and installed the drain leading from their respective properties to the Wiggins parcel, the drainage project would "belong solely to the [Heckmans and Mahlers] and will be the [Heckmans' and Mahlers'] responsibility to maintain/repair." We conclude that the circuit court erred by failing to grant summary disposition in favor of the Wiggins with regard to their trespass claim against the Heckmans and Mahlers pertaining to the physical presence of the drain itself.

Having determined that both the Heckmans and Mahlers are liable in trespass for the installation and continuing physical presence of the drain, we next consider what relief is available to the Wiggins vis-à-vis the Heckmans and Mahlers. It is well settled that a plaintiff who establishes the tort of trespass may recover money damages from the trespassing defendants. As noted earlier, once the tort of trespass has been established, "the plaintiff is presumptively entitled to at least nominal damages." *Adams*, 237 Mich App at 67. This is "because the violation of the right to exclude causes cognizable injury in and of itself . . . ." *Id*. at 72. Moreover, beyond the presumed, nominal damages, a plaintiff who establishes a trespass "may recover any additional, actual damages" as well. *Id*.

In addition to money damages, a plaintiff may be entitled to injunctive relief to enjoin a continuing trespass. It is true that " '[i]njunctive relief is an extraordinary remedy that issues only when justice requires,

there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury,' " and that "[g]ranting injunctive relief is within the sound discretion of the trial court." *Kernen v Homestead Dev Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998), quoting *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992). The general rule " 'is that the court will balance the benefit of an injunction to plaintiff against the inconvenience and damage to defendant, and grant an injunction or award damages as seems most consistent with justice and equity under all the circumstances of the case.' " *Kratze v Indep Order of Oddfellows*, 442 Mich 136, 143 n 7; 500 NW2d 115 (1993) (*Kratze II*), quoting *Hasselbring*, 263 Mich at 480. But "a court is not bound to engage in a balancing of the relative hardships and equities if the encroachment resulted from an intentional or wilful act . . . ." *Kratze II*, 442 Mich at 145. This Court has held that when a trespass "is of a permanent or continuous character," injunction "is an appropriate remedy." *Schadewald*, 225 Mich App at 40. Thus, for example, when certain defendants committed a trespass and exceeded the scope of their easement by impermissibly installing a sewer line across the servient estate, this Court affirmed the circuit court's permanent injunction prohibiting the defendants' use of the sewer line and requiring them to remove it. *Soergel v Preston*, 141 Mich App 585, 589-590; 367 NW2d 366 (1985). Similarly, in *Schadewald*, 225 Mich App at 39-40, the defendants committed a trespass by utilizing an easement encumbering the servient estate for a use that was not contemplated by the parties at the time the easement was created. This Court held that by expanding their use of the easement, the defendants had committed a "continuing trespass for which damages would be difficult to measure"; accordingly, the Court

remanded the matter to the circuit court with instructions to enter an injunction prohibiting the defendants' impermissible use of the easement. *Id*. at 40.

With respect to the drain at issue in the present case, it is clear that the Wiggins are entitled to at least nominal damages, and additionally any actual damages, resulting from the Heckmans' and Mahlers' trespass. It is also clear that the drain, which has already been installed on the Wiggins parcel, constitutes a trespass of a permanent and continuing nature. See *id*. Accordingly, the Wiggins are entitled to the entry of injunctive relief enjoining the Heckmans' and Mahlers' use of the drain and requiring the Heckmans and Mahlers to remove that portion of the drain that touches or encroaches on the Wiggins property.

In sum, we reverse the circuit court's grant of summary disposition in favor of the Heckmans and Mahlers with respect to the Wiggins' trespass claim pertaining to the drain itself and remand for entry of judgment in favor of the Wiggins on this claim. On remand, the circuit court shall enter an injunction enjoining the Heckmans' and Mahlers' use of the drain and requiring the Heckmans and Mahlers to remove that portion of the drain that touches or encroaches on the Wiggins parcel.[7] See *id*.; see also *Soergel*, 141 Mich App at 589-590. The court shall also conduct further proceedings to determine the appropriate amount of damages owed by the Heckmans and Mahlers as a result of this trespass.

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[7] We reiterate that the Heckmans and Mahlers—and not the City—are the owners of the trespassing drain. As explained previously, the Heckmans and Mahlers signed documents with the City acknowledging that after the City had constructed and installed the drain, the drainage project would "belong solely to the [Heckmans and Mahlers] and will be the [Heckmans' and Mahlers'] responsibility to maintain/repair."

B. DECLARATORY RELIEF

We also conclude that the circuit court erred by failing to consider the Wiggins' request for declaratory relief as it related to the Heckmans and Mahlers. Although it has become commonplace in this state for a plaintiff to assert a request for declaratory relief as a separately labeled cause of action within his or her complaint, this is technically improper because "declaratory relief is a remedy, not a claim." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 223; 761 NW2d 293 (2008); see also MCR 2.605(A). Nevertheless, a complaint must be read as a whole, and it is well settled that this Court will look beyond the mere procedural labels used in the pleadings. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). It is clear that, although the Wiggins' request for declaratory relief was incorrectly pleaded as a separate cause of action rather than as a prayer for relief, the Wiggins intended their request for declaratory relief to encompass the Heckmans and Mahlers in addition to the City. A careful examination of the complaint indicates that the Wiggins requested

> Declaratory Relief determining and declaring that *no Defendant named in this action* possesses any right, title, or interest in the Wiggins Property that would allow or authorize *any Defendant* to enter upon Plaintiffs' private property and excavate land, soil and turf and effect the installation of a drainage pipe . . . . [Emphasis added.]

Therefore, the circuit court erroneously stated in its opinion and order that "[t]he Mahler and Heckman Defendants are not parties to the [Wiggins'] request- . . . for Declaratory Relief . . . ." We reverse this portion of the circuit court's opinion and order, and remand for the entry of appropriate declaratory relief with respect to the Wiggins' underlying claims. On remand, the

circuit court shall declare at a minimum that the installation and construction of the drain exceeded the scope of the storm-detention easement encumbering the Wiggins parcel, see *Schmidt*, 94 Mich App at 738-739, and that the Heckmans and Mahlers committed a trespass by authorizing or ratifying the City's construction of the drain.

C. QUIET TITLE

We also conclude that the circuit court properly declined to consider the Wiggins' quiet-title claim as it related to the Heckmans and Mahlers. Our review of the complaint has established that the Wiggins asserted their quiet-title claim against the City only, and not against the Heckmans and Mahlers. The circuit court was therefore correct when it stated in its opinion and order that "[t]he Mahler and Heckman Defendants are not parties to the [Wiggins'] request to quiet title . . . ." Because the quiet-title claim was never asserted against the Heckmans and Mahlers, the circuit court did not err by failing to consider the claim in relation to those defendants.

IV. CLAIMS AGAINST THE HECKMANS AND MAHLERS PERTAINING TO THE FLOW OF WATER

The Wiggins do not merely argue that the installation and continuing physical presence of the drain constituted a trespass or a nuisance. They also argue with equal force that the increased flow of water onto their land through the drain—wholly separate and apart from the presence of the drain itself—constitutes a trespass and a nuisance. Many of the same rules applicable to our earlier discussion are also applicable here. However, there are also different rules of law,

governing the matter of surface-water flow, which now become relevant to our analysis.

A. TRESPASS AND NUISANCE

Although the flow of water onto the Wiggins parcel through the drain in question did not constitute a nuisance, we conclude that there remained a genuine issue of material fact concerning whether the flow of water constituted an actionable trespass.

It has been "the settled law of this State" for more than a century that the natural flow of surface waters from the upper, dominant estate forms a "natural servitude" that encumbers the lower, servient estate. *Carley v Jennings*, 131 Mich 385, 387; 91 NW 634 (1902); *Leidlein v Meyer*, 95 Mich 586, 589; 55 NW 367 (1893); see also *O'Connor v Hogan*, 140 Mich 613, 624; 104 NW 29 (1905); *Terlecki v Stewart*, 278 Mich App 644, 661; 754 NW2d 899 (2008); *Reed v Soltys*, 106 Mich App 341, 349; 308 NW2d 201 (1981). The owner of the lower, servient estate must bear this natural servitude, and is bound by law to accept the natural flow of surface waters from the upper, dominant estate. *Bennett v Eaton Co*, 340 Mich 330, 335-336; 65 NW2d 794 (1954); *Launstein v Launstein*, 150 Mich 524, 526; 114 NW 383 (1907); *Cranson v Snyder*, 137 Mich 340, 343; 100 NW 674 (1904); *Lewallen v City of Niles*, 86 Mich App 332, 334; 272 NW2d 350 (1978). It is similarly well settled, however, that "the owner of the upper estate has no right to increase the amount of water that would otherwise naturally flow onto the lower estate." *Kernen*, 232 Mich App at 512. For instance, it has been said that the owner of the upper estate "cannot, by artificial drains or ditches, collect the waters of . . . his premises, and cast them in a body upon the proprietor below him to his injury." *Gregory v Bush*, 64 Mich 37,

42; 31 NW 90 (1887). Nor may the owner of the upper estate "concentrate [the surface] water, and pour it through an artificial ditch or drain, in unusual quantities and greater velocity, upon an adjacent proprietor." *Peacock v Stinchcomb*, 189 Mich 301, 307; 155 NW 349 (1915); see also *Miller v Zahn*, 264 Mich 306, 307; 249 NW 862 (1933). Stated another way, "the owner of the dominant estate may not, by changing conditions on his land, put a greater burden on the servient estate by increasing and concentrating the volume and velocity of the surface water." *Lewallen*, 86 Mich App at 334.[8]

By way of example, in *Schmidt*, 94 Mich App at 738, the trial testimony established that "as a result of the development of [the dominant estate], the water runoff onto [the servient estate] was greatly increased, perhaps as much as six times the natural flow." The *Schmidt* Court stated the general rule:

> It is clear that the owner of the lower or servient estate must accept surface water from the upper or dominant estate in its natural flow, and equally clear that the owner of the dominant estate may not require the owner of the servient estate to accept a greater runoff by increasing or concentrating the flow. [*Id.*]

Because the owner of the dominant estate did not have an easement that permitted him to cast such "greatly increased" amounts of surface water upon the servient estate, this Court determined that he had exceeded the scope of the natural servitude that encumbered the servient estate and therefore affirmed the circuit

[8] Although these common-law rules were originally developed for use in rural settings, see *Village of Trenton v Rucker*, 162 Mich 19, 22-23; 127 NW 39 (1910); *Boyd v Conklin*, 54 Mich 583, 588-589; 20 NW 595 (1884), it now appears settled that the same rules apply within the boundaries of municipalities as well, see *Steele v City of Ionia*, 209 Mich 595, 599; 177 NW 259 (1920); see also *Robinson v Wyoming Twp*, 312 Mich 14, 24-25; 19 NW2d 469 (1945).

court's entry of judgment in favor of the proprietors of the servient estate. *Id*. at 738-739.

As these rules make clear, the Wiggins parcel is required to accept the surface-water runoff that naturally flows to it from the neighboring dominant estates. After all, as noted earlier, the natural flow of surface waters from the upper, dominant estate forms a "natural servitude" which arises by operation of law and encumbers the lower, servient estate. *Carley*, 131 Mich at 387. But, as in *Schmidt*, the dominant estates in the present case have no right to cast upon the Wiggins parcel more surface water than would naturally flow to it. Upon examining the plain language of the storm-detention easement, it is clear that the easement merely requires the servient estate to retain those waters that naturally flow to it as a result of "storm[s]," i.e., precipitation. As our Supreme Court has observed, "surface waters are commonly understood to be waters on the surface of the ground, *usually created by rain or snow . . . .*" *Fenmode, Inc v Aetna Cas & Surety Co*, 303 Mich 188, 192; 6 NW2d 479 (1942) (emphasis added). Giving a commonsense reading to the language of the storm-detention easement at issue in this case, see *Holley v Schneider*, 422 Mich 248, 253; 369 NW2d 857 (1985), it is apparent that the easement requires only that the servient estate detain or retain those surface waters that naturally flow to it from the dominant estates.

The Wiggins assert that by authorizing the installation of the drain at issue in this case, the Heckmans and Mahlers have increased the amount of water which would otherwise naturally flow onto the servient estate, and have therefore exceeded the scope of both the express storm-detention easement and the implied natural servitude encumbering the Wiggins parcel.

While it is certainly true that the drain casts some water onto the servient estate (after all, this was the purpose for which the drain was constructed), it is not clear whether the amount of water cast onto the Wiggins parcel through the drain exceeds the natural amount of surface water that has otherwise historically flowed to the property. While it is true that the City submitted to the circuit court a hydrogeologic contour map that purportedly showed the historical flow of surface waters in the area of Maplewood Meadows No. 1, this documentary evidence was not conclusive. Nor was the evidence given by the City's engineer or the affidavit of an employee of the drain commissioner's office conclusive on this matter. We conclude that there remained a genuine issue of material fact concerning whether the amount of water cast onto the Wiggins parcel through the drain exceeds the amount of surface water that has otherwise naturally and historically flowed to the Wiggins parcel from the dominant estates. The circuit court will be required to conduct further proceedings on remand with respect to this issue.

If it is determined on remand that the flow of surface water onto the Wiggins parcel *has been materially increased* beyond that which has historically and naturally flowed to it from the dominant estates, this will constitute an independent trespass to the Wiggins parcel. It is beyond dispute that a defendant's unauthorized act of causing excess waters to flow onto another person's property constitutes a trespass. See *Herro v Chippewa Co Rd Comm'rs*, 368 Mich 263, 265, 272; 118 NW2d 271 (1962); *Davis v Frankenlust Twp*, 118 Mich 494, 496; 76 NW 1045 (1898). This is because the unauthorized flooding of another person's land constitutes "an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams*,

237 Mich App at 67. As noted previously, once such an unauthorized intrusion is proved, the tort of trespass has been established, and "the plaintiff is presumptively entitled to at least nominal damages." *Id*. For these same reasons, the flow of excess waters onto the Wiggins parcel will not be actionable in nuisance because water is a physical, tangible object. See *id*.

And as stated earlier, "[i]t is a well-established principle of law that all persons who instigate, command, encourage, advise, ratify, or condone the commission of a trespass are cotrespassers and are jointly and severally liable as joint tortfeasors." *Kratze I*, 190 Mich App at 43. Thus, if it is determined following remand that the flow of surface water onto the Wiggins parcel has been materially increased beyond that which naturally flowed to it from the dominant estates, the Heckmans and Mahlers will be liable for this independent trespass onto the Wiggins parcel, and the Wiggins will be entitled to at least nominal damages from the Heckmans and Mahlers. *Adams*, 237 Mich App at 67. The Wiggins will also be entitled to injunctive relief. *Perry v Reed*, 147 Mich 146, 147; 110 NW 529 (1907) (stating that " '[i]t is . . . well settled that where one person does damage to another by flooding his lands . . . the party aggrieved may enjoin him by a decree in chancery, and in the same case have damages assessed for his injury' ") (citation omitted).

B. DECLARATORY RELIEF

In addition to seeking declaratory relief with respect to the installation and continuing physical presence of the drain itself, the Wiggins also sought declaratory relief with respect to the alleged increased flow of water onto their property. Consequently, if it is determined following remand that the flow of surface water onto

the Wiggins' property has been materially increased beyond that which naturally flowed to it from the dominant estates, the circuit court shall declare that this increased flow exceeds the scope of the express storm-detention easement and the natural servitude encumbering the Wiggins parcel, and shall declare that the Heckmans and Mahlers committed an additional trespass by causing or authorizing this increased flow of water.

V. CLAIMS AGAINST THE CITY

The Wiggins also argue that the circuit court erred by dismissing their claims against the City and by relying on the statutory procedures set forth in § 75 of the Drain Code, MCL 280.75. We agree that the circuit court erred by relying on MCL 280.75. We also agree that the circuit court erred by dismissing the Wiggins' inverse-condemnation claim, at least in part. However, with respect to the Wiggins' tort claims against the City, we remand for a determination whether the City is entitled to governmental immunity.

A. THE DRAIN CODE

As explained previously, the circuit court ultimately dismissed all claims against the City "without prejudice so that the [Wiggins] and the City can follow the procedure . . . laid out in MCL 280.75." MCL 280.75 provides in its entirety:

> If all persons whose lands would be traversed or damaged by the proposed drain or drains shall not have executed a release of the right of way, and all damages on account thereof, within 60 days after the entry of the first order of determination, the [drain] commissioner shall, as soon as practicable, make application to the probate court of the county in which such lands are situated, for the

> appointment of 3 special commissioners, who shall be disinterested resident freeholders of the county, but not of the township or townships affected by such drain, to determine the necessity for the taking of private property for the use and benefit of the public, and the just compensation to be made therefor. Such application shall be in writing, and shall set forth:
>
> First, The fact that a petition for a drain was made and when, filing with said court a certified copy of such petition, also giving the route, survey and specifications of said drain as set forth in the first order of determination;
>
> Second, That an order determining the necessity for such drain was made by the commissioner or drainage board, giving the time when such order was made, in accordance with such route, survey and specification, as above set forth;
>
> Third, (1) The several descriptions or tracts of land with the names of the owner or owners of every such tract who have refused or neglected to execute a release of right of way and damages in any way arising or incident to the opening or maintaining the said proposed drain (2) the several descriptions or tracts of land owned by any minor, incompetent person, unknown persons or nonresidents of the township or townships, the execution of a release of right of way and damages for which have been neglected or refused; (3) it shall not be necessary to set forth in said application to the probate court the names of the several owners nor the description of the several tracts or parcels of land liable to an assessment for benefits, in case the drain applied for should be located and established, except those who have not released the right of way and through whose lands the drain passes; nor shall the same be included in the citation issued from the probate court.

MCL 280.75 is contained in chapter 4 of the Drain Code, MCL 280.71 *et seq*. Reading the statutes contained in chapter 4 together and in harmony with one another, see *People v Stephan*, 241 Mich App 482, 497-498; 616 NW2d 188 (2000), it is clear that the

procedures set forth in MCL 280.75 apply only to *proposed* drains and not to drains that are already in existence. See MCL 280.73. Moreover, it is clear that the procedures set forth in MCL 280.75 do not come into play until "[a]fter a drainage district has been established," MCL 280.71, after the drain commissioner has "endeavor[ed] to secure from the owners of each parcel or tract of land to be traversed or damaged by the proposed drain or drains an easement or release of right of way," MCL 280.73, after "a petition for [the] drain" has been filed, MCL 280.75, and after "an order determining the necessity for such drain" has been made by the drain commissioner or drainage board, MCL 280.75. None of these statutory prerequisites was ever realized in the instant case, and we conclude that the relevant procedures set forth in MCL 280.75 consequently never came into play.

In addition, it is unclear to us how the City and the Wiggins would be able to follow the procedures set forth in the Drain Code at this point in time when the proper authorities never sought to establish the drain under the Drain Code in the first instance. In essence, the parties would have to "start over" even though the drain is already in existence. The circuit court's determination that the parties should effectively start over and follow the relevant procedures set forth in MCL 280.75 does not strike us as a logical result. We conclude that the better course is to remand this matter to the circuit court with instructions to enter an injunction requiring the Heckmans and Mahlers to remove the drain. If the City then wishes to reestablish the drain after the drain is removed pursuant to this injunction, the parties will be better positioned to follow the procedures set forth in the Drain Code for establishing and constructing new drains.

In sum, we conclude that the circuit court erred by dismissing all claims against the City on the basis of the procedures set forth in MCL 280.75. Under the particular circumstances of this case, the statutory procedures of MCL 280.75 do not apply.

B. INVERSE CONDEMNATION

We next conclude that there remained a genuine issue of material fact concerning whether the City's installation of the drain itself constituted a taking of private property without just compensation. Both the United States and Michigan constitutions prohibit the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). However, "[n]o precise formula exists" for determining whether a governmental invasion or intrusion constitutes a taking of private property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). Instead, several factors must be considered. *Id*. "Further, a plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages." *Id*. It has been said that "[a] plaintiff alleging a de facto taking or inverse condemnation must prove 'that the government's actions were a *substantial* cause of the decline of his property's value' and also 'establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property.' " Id., quoting *Heinrich v Detroit*, 90 Mich App 692, 700; 282 NW2d 448 (1979). "While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of

limiting the use of the property." *Charles Murphy, MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993).

It is clear that the construction and installation of the drain itself was an affirmative act by the City or its agents, specifically directed toward the Wiggins' property, which had the effect of limiting the use of the Wiggins parcel. *Id*. What is not clear is how much damage was caused by the City's installation of the drain and whether the City's actions were " 'a *substantial* cause of the decline of [the Wiggins parcel's] value.' " *Hinojosa*, 263 Mich App at 548, quoting *Heinrich*, 90 Mich App at 700. Accordingly, on remand, the circuit court will be required to conduct further proceedings concerning the Wiggins' inverse-condemnation claim to (1) determine whether the installation of the drain itself constituted a de facto taking at all (i.e., whether the construction and installation of the drain was a substantial cause of a decline in the Wiggins parcel's value) and (2) if it did constitute a de facto taking, determine the proper amount of compensation payable to the Wiggins by the City.

In contrast, we conclude that any material increase in the flow of water through the drain—even if established on remand—could *not* have constituted a taking as a matter of law. It is well settled that a governmental actor may cause a taking of private property by flooding the property or diverting excess surface water onto the property. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 189 n 16; 521 NW2d 499 (1994); see also *Herro*, 368 Mich at 275. However, as noted earlier, ownership of the drain and drainage system was transferred to the Heckmans and Mahlers immediately upon the City's completion of the project. In other words, because any flooding of the Wiggins parcel necessarily occurred *after* the drainage project was completed, the

City no longer owned the drain at the time. "[I]t is elementary that an inverse condemnation action—being based upon the taking or damaging of property for public use without just compensation—requires state action and, therefore, cannot be asserted against private parties." *Bach v Butte Co*, 215 Cal App 3d 294, 307; 263 Cal Rptr 565 (1989). Thus, while the City may well be liable in inverse condemnation for its construction and installation of the physical drain itself, the City can have no inverse-condemnation liability arising out of the flow of water through the privately owned drain.

C. GOVERNMENTAL TORT IMMUNITY

The circuit court did not reach the issue of the City's liability on the Wiggins' remaining tort claims, choosing instead to dismiss these claims against the City without prejudice on the basis of MCL 280.75. We have already concluded that the circuit court's reliance on MCL 280.75 was erroneous.

The City argues that even if the circuit court improperly invoked the Drain Code to dismiss the Wiggins' claims, it is entitled to governmental immunity. As the City points out, our Supreme Court has made clear that the tort immunity granted to governmental entities is broad, and that there is no trespass-nuisance exception to governmental immunity. *Pohutski*, 465 Mich at 689-690. In addition, none of the six statutory exceptions to governmental immunity appears to apply in this case. See MCL 691.1407(1); *Lash v Traverse City*, 479 Mich 180, 195; 735 NW2d 628 (2007). However, as the Wiggins correctly observe, the question of the City's entitlement to governmental immunity was not decided by the circuit court, and issues not decided below are generally considered unpreserved for appellate review. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67,

83; 600 NW2d 348 (1999). We decline to address this issue for the first time on appeal. *Id*.

On remand, the circuit court will be required to consider whether the City is entitled to governmental immunity with respect to the Wiggins' tort claims.[9] Specifically, the circuit court will be required to decide whether governmental immunity insulates the City only from the Wiggins' claims for money damages, see *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 152 n 5; 422 NW2d 205 (1988) (opinion by BRICKLEY, J.) (stating that "[g]enerally, we do not view actions seeking only equitable relief, such as abatement or injunction, as falling within the purview of governmental immunity"), overruled on other grounds by *Pohutski*, 465 Mich at 678-679, or whether governmental immunity bars *all* of the Wiggins' tort claims against the City, including those seeking only injunctive, declaratory, or other equitable relief, see *Jackson Co Drain Comm'r v Village of Stockbridge*, 270 Mich App 273, 284; 717 NW2d 391 (2006) (holding that "[t]he plain language of the [governmental immunity] statute does not limit the immunity from tort liability to liability for [money] damages"). The circuit court should also consider whether our Supreme Court's decision in *Lash* has had any effect on the abovementioned holding of *Jackson Co Drain Comm'r*. See *Lash*, 479 Mich at 196 (noting that although the plaintiff could not enforce certain statutory requirements by maintaining a cause of action for money damages against the governmental defendant, he "could enforce the statute by seeking injunctive relief . . . or declaratory relief").

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[9] Naturally, the City is not entitled to governmental immunity with respect to the Wiggins' inverse-condemnation claim. *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989).

VI. CONCLUSION

We affirm the circuit court's dismissal of the Wiggins' nuisance claim against the Heckmans and Mahlers. We also affirm the circuit court's determination that the Heckmans and Mahlers were not parties to the Wiggins' quiet-title claim.

However, we reverse the circuit court's dismissal of the Wiggins' trespass claim against the Heckmans and Mahlers. By authorizing or ratifying the City's installation of the drain itself, the Heckmans and Mahlers committed a trespass as a matter of law. Moreover, there remained a genuine issue of material fact concerning whether the alleged increased flow of water onto the Wiggins parcel constituted an additional trespass by the Heckmans and Mahlers. We also reverse the circuit court's determination that the Heckmans and Mahlers were not parties to the Wiggins' request for declaratory relief.

On remand, the circuit court shall declare that the Heckmans and Mahlers trespassed on the Wiggins parcel as a matter of law by authorizing or ratifying the City's installation of the drain. The court shall also take additional evidence and conduct further proceedings concerning (1) whether the alleged increased flow of water onto the Wiggins parcel constituted an additional trespass by the Heckmans and Mahlers, and (2) the appropriate amount of damages owed by the Heckmans and Mahlers for trespassing on the Wiggins parcel. At a minimum, the court shall award the Wiggins nominal damages for all trespasses committed by the Heckmans and Mahlers, shall enter injunctive relief directing the Heckmans and Mahlers to remove the drain, and shall grant other declaratory relief consistent with this opinion.

We reverse the circuit court's dismissal of the Wig-

gins' claims against the City on the basis of MCL 280.75. The circuit court erred as a matter of law by relying on the Drain Code to dispose of those claims. There remained a genuine issue of material fact concerning whether the City's installation of the drain itself constituted a taking of the Wiggins' private property without just compensation. On remand, the circuit court shall take additional evidence and conduct further proceedings concerning the Wiggins' inverse-condemnation claim consistent with this opinion. The circuit court shall also consider and decide whether the City is entitled to governmental immunity with respect to the Wiggins' tort claims against it. If the court determines that the City is entitled to governmental immunity with respect to the Wiggins tort claims, it shall dismiss the claims on that basis. On the other hand, if the court determines that any of the tort claims against the City (such as those seeking only injunctive or declaratory relief) are not barred by governmental immunity, it shall conduct further proceedings concerning those surviving claims.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs under MCR 7.219, a public question having been involved.

MCKIMMY v MELLING

Docket No. 298700. Submitted January 4, 2011, at Lansing. Decided February 10, 2011 at 9:00 a.m.

Plaintiff, Charla French McKimmy, moved in the Jackson Circuit Court for a change of domicile of herself and her two boys from Jackson, Michigan to Minot, North Dakota. The boys' father, Patrick Melling (defendant), opposed the move. He argued that plaintiff's proposed parenting-time schedule that would give him uninterrupted time with the boys for 10 weeks during the summer—in contrast with the existing schedule of every weekend including one overnight—would adversely affect his bond with the boys because the rest of the year he would have very little physical contact with them. The court, Susan E. Beebe, J., denied the motion, finding that the boys were too young for contact via telephone and the Internet to be meaningful and that weekly physical contact with defendant was better for the boys than a long, uninterrupted period. Plaintiff appealed.

The Court of Appeals *held*:

A parent of a child whose custody is governed by court order may change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued if the court after complying with MCL 722.31(4), permits the change of residence. Before allowing the change, the court must be satisfied that it is possible to order a modification of the parenting-time schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent. MCL 722.31(4)(c). The modified parenting-time schedule need not be equal with the current visitation plan, and the correct inquiry under factor (c) is not which plan—current or proposed—is the best plan but whether the proposed parenting-time schedule provides a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the nonrelocating parent. The trial court erroneously interpreted the law and improperly compared the two schedules to determine which was better instead of considering whether the schedule proposed

by plaintiff provided a realistic opportunity or an adequate basis to preserve and foster the relationship defendant currently shared with the two boys.

Vacated and remanded.

PARENT AND CHILD — CHILD CUSTODY — CHANGES IN CHILD'S LEGAL RESIDENCE — FACTORS.

A parent of a child whose custody is governed by court order may change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued if the court, after complying with MCL 722.31(4), which sets forth factors to be considered in a change of domicile, permits the change of residence; before allowing the change, the court must be satisfied that it is possible to order a modification of the parenting-time schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; the modified parenting-time schedule need not be equal with the current visitation plan, and the correct inquiry under factor (c) is not which plan (the current plan or the proposed plan) is the best plan, but whether the proposed parenting-time schedule provides a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the nonrelocating parent.

Alane & Chartier, P.L.C. (by *Natalie Alane*), for plaintiff.

White & Hotchkiss, PLLC (by *Kenneth R. Hotchkiss*), for defendant.

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM. Plaintiff appeals by leave granted the trial court's order denying her motion for change of domicile. Because we conclude that the trial court misapplied factor (c) of the statutory change of domicile factors, MCL 722.31(4), we vacate the trial court's order and remand for new findings on factor (c).

I. BASIC FACTS

Plaintiff and defendant are the parents of two young boys. They share joint legal custody of the boys, while plaintiff maintains sole physical custody. Defendant has parenting time every weekend from 9:00 a.m. on Saturday until 7:00 p.m. on Sunday. He consistently exercises his parenting time, and his bond with the boys is "[e]xceptional."

In October 2009, plaintiff moved the trial court for permission to change the boys' domicile from Jackson, Michigan, to Minot, North Dakota, where her fiancé lived. At the evidentiary hearing, plaintiff testified that she had since married her fiancé and that they had purchased a four-bedroom house in a safe and family-oriented neighborhood in Minot. Plaintiff proposed a modified parenting-time schedule for defendant, where the boys would stay with defendant over the summer and on alternate holidays. Plaintiff also suggested that defendant could have regular contact with the boys over the telephone and the Internet. Defendant acknowledged that under plaintiff's proposed parenting time schedule, he would have substantially more overnights with the boys, but he believed that regular physical contact with the boys was necessary to maintain his bond with them.

The trial court denied plaintiff's motion for change of domicile. The trial court concluded that a move to North Dakota had the capacity to improve the quality of life for plaintiff and the two boys and that plaintiff's desire to move to North Dakota was not to defeat defendant's parenting time. However, it concluded that any benefits of the move were outweighed by the "potentially very dire" consequences on the relationship between defendant and the two boys. In reaching this conclusion, the trial court

found the ages of the boys, three and four years, to be particularly relevant. It stated:

> And at three and four years old you look for a lot of guidance and a lot of caring from your parents. And certainly at three and four years old you don't have a cell phone; you probably, these probably aren't kids that want to spend a whole heck of a lot of time on the phone; and they probably don't have a really long attention span when it comes down to sitting down and Skyping with dad or, or having that kind of relationship. And so much of preserving and fostering a relationship with younger children is simply being there and performing those tasks with them, and being as [defendant's attorney] referenced, being there for, you know, certain events that they go through and, and being able to be there and having the capacity and ability to be there to give them a hug, and, and that's not to say that you can't be an exceptional parent over the phone or via technology. I think — I, the court just thinks that with, with the children's ages it's probably a little more difficult to say that telephone contact and email contact and Skyping is gonna be as meaningful as, for a three and four year old, as having them spending time weekly in the physical presence of their dad.

The trial court recognized that defendant would have "nonstop parenting time" during the summer under plaintiff's proposed parenting-time schedule, but noted that "the cost" would be defendant having only very limited contact with the children during the remaining nine months of the year. It thought there was "a real possibility" that defendant's relationship with the two boys would suffer; it was unsure how well the relationship could be maintained if the boys were not in the physical presence of defendant each week.

II. ANALYSIS

On appeal, plaintiff argues that the trial court improperly analyzed factor (c) of the statutory change of

domicile factors, MCL 722.31(4). Specifically, plaintiff maintains that the trial court fixated too heavily on the frequency of the visits under her proposed parenting-time schedule and whether the two boys could effectively use technology, while failing to consider whether awarding defendant extended periods of parenting time would preserve and foster the parent-child relationship. We agree that the trial court erred in its application of factor (c), but for a reason different than that argued by plaintiff.

A. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's ultimate decision whether to grant a motion for change of domicile. *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). However, the trial court's findings of fact regarding the statutory change of domicile factors are reviewed under the great weight of the evidence standard. *Id.* Under this standard, we may not substitute our judgment on questions of fact unless the facts clearly preponderate in the opposite direction. *Rittershaus v Rittershaus*, 273 Mich App 462, 472-473; 730 NW2d 262 (2007). But where a trial court's findings of fact may have been influenced by an incorrect view of the law, our review is not limited to clear error. *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990).

B. APPLICABLE LAW

"[A] parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued." MCL 722.31(1). However, the prohibition in subsection (1)

does not apply if the other parent consents to the move or the court, after complying with subsection (4), permits the change of residence. MCL 722.31(2). MCL 722.31(4) provides:

> Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:
>
> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.[1]

The party requesting the change of domicile has the burden of establishing by a preponderance of the evidence that the change is warranted. *Mogle v Scriver*, 241 Mich App 192, 203; 614 NW2d 696 (2000).

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[1] The trial court stated that factors (d) and (e) had no bearing on its decision.

Implicit in factor (c) is an acknowledgement that weekly visitation is not practicable when parents are separated by state borders. *Brown*, 260 Mich App at 603. Indeed, when the domicile of a child is changed, the new visitation plan need not be equal with the old visitation plan, as such equality is not possible. *Anderson v Anderson*, 170 Mich App 305, 310; 427 NW2d 627 (1988). The new visitation plan "only need provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed" by the nonrelocating parent. *Mogle*, 241 Mich App at 204. This Court has previously opined that "[p]erhaps" extended periods of visitation will "foster, not hinder," a closer parent-child relationship. *Anderson*, 170 Mich App at 311. In applying factor (c), a trial court should consider the financial feasibility of the new visitation plan and the ages of the children, *Grew v Knox*, 265 Mich App 333, 341; 694 NW2d 772 (2005); *Brown*, 260 Mich App at 605, as well as the use of modern technology, *Rittershaus*, 273 Mich App at 468. The separation between a parent and a child "can be diminished by the use of modern communication technology." *Id.*

C. APPLICATION

In this case, the trial court, as required by statute, MCL 722.31(4), kept the two boys as its primary focus in applying factor (c). It also gave consideration to many of the relevant factors identified in caselaw. The trial court considered the boys' young ages and found their ages to be particularly relevant. It considered the use of modern technology but found that the boys, because of their young ages, would not derive much benefit from communicating with defendant over e-mail, telephone,

and Skype.[2] In addition, the trial court acknowledged that under plaintiff's proposed parenting-time schedule, defendant would have 10 weeks of nonstop parenting time during the summer.

However, in applying factor (c), the trial court failed to recognize that the parenting-time schedule proposed by plaintiff need not be equal with the current visitation plan. *Anderson*, 170 Mich App at 310. The trial court, in considering whether modern technology could diminish the separation between defendant and the two boys, stated, "[I]t's probably a little more difficult to say that telephone contact and email contact and Skyping is gonna be as meaningful as . . . having them spending time weekly in the physical presence of [defendant]." The trial court essentially compared plaintiff's proposed parenting-time schedule with the current visitation plan, and found that the current plan was in the best interests of the two boys. But the inquiry under factor (c) is not which plan, the current visitation plan or the proposed schedule, is the best plan. Rather, the inquiry is only whether the proposed parenting-time schedule provides "a realistic opportunity to preserve and foster the parental relationship previously enjoyed" by the nonrelocating parent. *Mogle*, 241 Mich App at 204. Thus, the trial court should have considered whether the parenting-time schedule proposed by plaintiff provided "a realistic opportunity" or "an adequate basis," MCL 722.31(4)(c), to preserve and foster the relationship defendant currently shared with the two boys, without regard to whether plaintiff's proposed schedule was equally beneficial to the two boys as the current visitation plan. As a result, we are constrained to conclude that the trial court's decision was improp-

[2] Skype is an online software application that allows users to make both voice and video contact with other users by means of the Internet.

erly influenced by an erroneous interpretation of factor (c). *Beason*, 435 Mich at 804-805.

Consequently, we vacate the trial court's order denying plaintiff's motion for change of domicile and remand. On remand, the trial court shall apply its findings of fact on factor (c) by determining whether plaintiff's proposed parenting-time schedule provides "a realistic opportunity to preserve and foster the parental relationship" defendant enjoys with the two boys without comparing the current and proposed visitation plans. In accordance with those findings, the trial court shall issue a new order granting or denying plaintiff's motion.

Vacated and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

PRINS v MICHIGAN STATE POLICE

Docket No. 293251. Submitted November 3, 2010, at Lansing. Decided February 15, 2011, at 9:00 a.m.

Nancy A. Prins brought an action in the Ionia Circuit Court against the Michigan State Police and David Fedewa, an agent of the state police, asserting a violation of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., occurred when defendants denied her request for records regarding a traffic stop. Defendants moved for summary disposition on the ground that the 180-day period of limitation had expired, barring plaintiff's action. The court, Suzanne Hoseth-Kreeger, J., agreed with defendants that the period of limitation began running the date defendants wrote the letter denying plaintiff's request, not the date the letter was mailed, and that the suit was untimely. Plaintiff appealed.

The Court of Appeals *held*:

MCL 15.235(2)(b) requires that a public body respond to a request for public records either by granting it or by issuing a written notice to the requesting person denying the request. If a public body denies a request for information, under MCL 15.240(1)(b) the requesting person may commence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's determination to deny a request. The public body must undertake an affirmative step reasonably calculated to bring the denial notice to the attention of the requesting party; merely creating a document denying a record request is insufficient to start the running of the 180-day time limit. The trial court erred in concluding that the period of limitation began running when the denial letter was written. The 180-day period began on the date the letter was mailed, and plaintiff's suit was therefore timely.

Reversed.

LIMITATION OF ACTIONS — FREEDOM OF INFORMATION ACT — PERIODS OF LIMITATIONS — COMMENCEMENT.

The Freedom of Information Act requires that a public body respond to a request for public records either by granting it or by issuing a written notice to the requesting person denying the request; if a

> public body denies a request for information, the requesting person may commence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's determination to deny a request; the public body must undertake an affirmative step reasonably calculated to bring the denial notice to the attention of the requesting party; merely creating a document denying a record request is insufficient to start the running of the 180-day time limit (MCL 15.235[2][b], 15.240[1][b]).

Bruce A. Lincoln for Nancy Ann Prins.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Thomas Quasarano*, Assistant Attorney General, for the Michigan State Police.

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

GLEICHER, J. In this case arising under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., we consider how to calculate the time limit for filing a circuit court action after a public body has denied access to a public record. The precise issue presented is whether the 180-day period of limitation begins to run when a public body writes a letter denying access to information, or when the public body places the denial letter in the mail. We hold that mailing triggers the running of the 180-day period of limitation, and reverse the circuit court's grant of summary disposition to defendants.

On May 4, 2008, Michigan State Police trooper James Yeager stopped a vehicle driven by plaintiff Nancy Prins. Trooper Yeager issued Prins's passenger, Jack Elliott, a citation for not wearing a seat belt. In a letter dated July 22, 2008, Prins submitted a FOIA request to the state police seeking, among other things, "[a]ny recording or other electronic media taken by Trooper

James Yeager (officer no 987) on May 4th, 2008 between the hours of 10:00 am to 12:00 pm of me while traveling upon Morrison Lake Rd and Grand River Rd, within Boston Twp., Ionia County, Michigan." In a letter dated July 26, 2008, a Saturday, the state police denied Prins's request, explaining, "Any in car video that may have existed is no longer available. Only kept 30 days [and] reused." The envelope enclosing the letter to Prins bore a postmark of July 29, 2008, a Tuesday.

On October 29, 2008, Elliott appeared at a hearing to contest his seat belt citation, and the prosecutor produced the videotape depicting the May 4, 2008, traffic stop. On January 26, 2009, Prins filed in the Ionia Circuit Court a complaint seeking damages for defendants' violation of the FOIA.[1] The state police moved for summary disposition on the ground that the applicable period of limitation, MCL 15.240(1)(b), barred Prins's FOIA action. The state police asserted that the 180-day period began to run on July 26, 2008, the date the police authored the denial letter, and that Prins untimely filed her complaint 184 days later. Prins countered that the act of mailing the denial letter triggered the 180-day time limit, rendering her complaint timely.[2] In a bench opinion, the circuit court granted defendants summary disposition.

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[1] The FOIA contemplates that "[i]f a person asserting the right to" access a public record "prevails in an action commenced under this section," the court "shall award reasonable attorneys' fees, costs, and disbursements." MCL 15.240(6). If the court determines that "the public body has arbitrarily and capriciously" violated the FOIA, "the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public record." MCL 15.240(7).

[2] Prins filed her complaint 181 days after the postmarked date of July 29, 2008. But because the 180th day fell on a Sunday, we consider Prins's complaint to have been filed within 180 days. MCR 1.108(1).

We review de novo the circuit court's summary-disposition ruling. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). A court may grant summary disposition under MCR 2.116(C)(7) when a period of limitation bars a claim. "Whether a period of limitations applies to preclude a party's pursuit of an action constitutes a question of law that we review de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003). The burden of proving that a claim is time-barred rests on the party asserting the defense. *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 5; 555 NW2d 496 (1996).

We also review de novo legal issues of statutory construction. *In re Petition of Attorney General for Investigative Subpoenas*, 282 Mich App 585, 590; 766 NW2d 675 (2009). "Well-established principles guide this Court's statutory construction efforts." *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002). We begin by examining the specific statutory language under consideration, bearing in mind that

> [w]hen faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. [*Id.* (citations and quotation marks omitted).]

When ascertaining legislative intent, we read the entire act and interpret a particular word in one statutory section only "after due consideration of every other

section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922). This Court considers both the plain meaning of critical words or phrases comprising the statute and their placement and purpose in the statutory scheme. *People v Blunt*, 282 Mich App 81, 84; 761 NW2d 427 (2009).

Two relevant subsections of the FOIA control our analysis. The first establishes that "[a] written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request." MCL 15.235(4). The second states that if a public body denies a request for information, the requesting person may "[c]ommence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's determination to deny a request." MCL 15.240(1)(b). The state police assert that the 180-day period of limitation commences on the date a public body writes a denial letter. Prins counters that the denial of a request encompasses both writing a letter *and* taking reasonable steps to communicate the denial to the requesting party.

Read in isolation, MCL 15.240(1)(b) appears to suggest that the 180-day period commences with "a public body's final determination to deny a request." But to ascertain the Legislature's intent, we must construe the FOIA as a whole, harmonizing its provisions. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993). The FOIA commands that a public body respond to a request for public records either by granting it, or by "[*i*]*ssuing* a written notice to the requesting person denying the request." MCL 15.235(2)(b) (emphasis added). Black's Law Dictionary (7th ed), p 836, sets forth the following pertinent

definitions of the term "issue": "To be put forth officially[.] . . . To send out or distribute officially[.]" *Webster's New World Dictionary, Second College Edition* (1970), defines "issue," in relevant part, as "to let out; discharge[;] — to publish; put forth and circulate; give out publically or officially."

These definitions imply that a public body cannot fulfill its statutory obligation to issue a notice merely by creating a document denying a record request. Rather, the Legislature intended that the public body undertake an affirmative step reasonably calculated to bring the denial notice to the attention of the requesting party. Thus, a public body has not satisfied the statute's notice requirement until it "sends out" or officially circulates its denial of a public record request. This construction of the FOIA prevents a public body's inadvertent failure to timely mail a denial letter from unduly shortening the 180-day period of limitation. Because the FOIA mandated that the state police transmit its July 26, 2008, letter to Prins, we hold that the denial of her request occurred on July 29, 2008, when the state police issued the denial by placing it in the mail. Prins had 180 days from July 29, 2008, to commence a circuit court action, and thus her lawsuit qualified as timely filed. Consequently, we reverse the circuit court's grant of summary disposition to defendants, and remand for further proceedings.

We lastly note the state police's appellate contention that the circuit court should have granted summary disposition on an alternate ground. The state police maintains that Prins did not timely respond to its demand for a reply to the affirmative defenses set forth in its answer, as mandated by MCR 2.110(B)(5). According to the state police, the circuit court should have deemed the affirmative defenses admitted. However, we

reject the state police's reading of the relevant court rules, on the basis of the following pertinent analysis of this Court in *McCracken v Detroit*, 291 Mich App 522, 528-529; 806 NW2d 337 (2011):

> Based on the plain language of the court rules defining pleadings and responsive pleadings, plaintiffs were not required to respond to defendants' affirmative defenses, even though defendants demanded a response in them. MCR 2.110(B) exclusively defines pleadings requiring a response and affirmative defenses are not included. Accordingly, plaintiffs' failure to file a response to defendants' affirmative defenses did not amount to a concession regarding the truth of the affirmative defenses under MCR 2.111(E)(1). Alternatively stated, *defendants' affirmative defenses demanding a response are not pleadings requiring a response, and the trial court should have taken them as denied*. [Emphasis added.]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

COPUS v MEEMIC INSURANCE COMPANY

Docket No. 295499. Submitted February 9, 2011, at Detroit. Decided February 15, 2011, at 9:05 a.m.

Dorene Copus brought suit in the Kent Circuit Court against her no-fault insurer, MEEMIC Insurance Company, seeking work-loss benefits. Plaintiff was a teacher and, although she did not teach during the summer, she had an annual contract and had elected to be paid in 26 biweekly installments. After an automobile accident, she had been unable to work for the entire school year. Her adjusted monthly wage was less than the statutory maximum, and she argued in the trial court that this was the amount she was allowed. Defendant argued that her benefits should instead be calculated on the basis of the specific number of calendar days plaintiff would have worked each month; this would make her adjusted monthly benefit exceed the statutory cap for some months and be reduced to zero in summer months, decreasing her total benefits by the amount those months exceeded the cap. The court, Paul J. Sullivan, disagreed with defendant's method of calculating the benefits and awarded plaintiff the amount she sought. Defendant appealed.

The Court of Appeals *held*:

The work-loss benefits payable under the no-fault act are based on loss of income from work an injured person would have performed if he or she had not been injured. If a claimant missed work, the only determination to be made is the amount of income lost as a consequence of not performing that work. Pursuant to plaintiff's employment contract, the income plaintiff lost because she did not work was her full annual salary consisting of the 26 biweekly paychecks she did not receive due to her being injured.

Affirmed.

INSURANCE — NO-FAULT — WORK-LOSS BENEFITS — CALCULATION OF BENEFITS.

The work-loss benefits payable under the no-fault act are based on loss of income from work an injured person would have performed if he or she had not been injured; if a claimant has missed work,

> the only determination to be made is the amount of income lost as a consequence of not performing that work (MCL 500.3107[1][b].

William W. Decker, Jr., LLC (by *William W. Decker, Jr.*), for plaintiff.

Garan Lucow Miller, P.C. (by *Daniel S. Saylor* and *Caryn A. Gordon*), for defendant.

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Defendant appeals by right an order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff and denying it to defendant. This case involves computation of work-loss benefits under the no-fault act, MCL 500.3101 *et seq*. We affirm.

Plaintiff was injured in a serious automobile accident and sought wage-loss benefits from defendant, her insurer. Plaintiff's wage-loss benefit under the no-fault act is governed by MCL 500.3107(1)(b), which provides that personal protection insurance benefits are payable for

> [w]ork loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. Beginning March 30, 1973, the benefits payable

> for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed $1,000.00, which maximum shall apply pro rata to any lesser period of work loss. Beginning October 1, 1974, the maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner . . . . [Emphasis added.]

Both parties agree that the adjusted benefit is now $4,713.

Plaintiff is a special education teacher on a yearly contract with a yearly salary of $63,895. Plaintiff had the option of electing to be paid in 21 installments while school was in session or in 26 biweekly installments throughout the entire year, and she elected the latter.[1] She sought benefits for the 2008-2009 school year. Plaintiff and the trial court computed her wage-loss payments by dividing her yearly salary, less fifteen percent, by twelve months. She and the trial court therefore found she was entitled to $4,525.90 a month. Because this is below the maximum monthly amount payable, plaintiff was therefore entitled to a total of $54,310.75.

Defendant, however, argues that plaintiff's entitlement should be computed on the basis of the specific number of calendar days plaintiff's contract specified that she should work, notwithstanding the yearly nature of her contract and her election to be paid throughout the year. Defendant therefore would divide plaintiff's yearly salary by her 183 contract workdays and subtract taxes to arrive at $296.78 a day. It then multiplied her daily amount by the number of days

[1] We note that plaintiff did so not only for the school year at issue, but the previous year as well.

actually worked in each 30-day period, making allowances for scheduled days off. It arrived at monthly amounts ranging from $3,858.14 to $6,529.16, as well as two months in the summer with no payment at all. Because many months under defendant's computational framework would exceed the statutory cap, it would find plaintiff entitled to a total of only $44,268.64.

We review de novo dispositions of motions for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review de novo questions of statutory interpretation. *People v Swafford*, 483 Mich 1, 7; 762 NW2d 902 (2009). The ultimate goal for the courts when analyzing a statute is to effectuate the intent of the Legislature. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004). "The no-fault insurance act is remedial in nature and must be liberally construed in favor of persons intended to benefit" from its goal of guaranteeing motor vehicle accident victims compensation for certain economic losses. *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 61; 404 NW2d 199 (1987).

There is nothing ambiguous about MCL 500.3107(1)(b). As defendant correctly points out, statutes must be read as a whole. The first sentence of MCL 500.3107(1)(b) may not be phrased as artfully as possible, but it is clearly a definition provision: "work loss" is *defined* as "loss of income from work an injured person would have performed . . . if he or she had not been injured." The statute provides an upper limit on the amount of monthly compensation for work loss. However, the statute does not mandate any sort of temporal correlation between the work and the income, as defendant asserts. The calculation might be simplest if a claimant is paid a straightforward, fixed dollar

amount per day, but the fact that a salaried employee's income is not so linearly tied to the strict number of hours worked is not an impediment to proper calculation. Obviously, if a claimant does not actually miss any work, the claimant cannot claim any loss of income under the statute as a consequence. But if a claimant has missed work—as plaintiff has here—it remains only to determine the income lost as a consequence of not performing that work.

Put another way, MCL 500.3107(1)(b) does *not* say *when* "work loss" must be deemed to occur. This is reasonable. In a straightforward, hourly employment context, many employers delay paychecks by some number of pay periods, so missing a day of work may not be reflected in a claimant's paycheck for some time. The income lost because the claimant did not work is therefore a reduction in pay several weeks—or more—later. In the instant case, pursuant to plaintiff's contract, the income plaintiff lost because she did not work was 26 biweekly paychecks, totaling $63,895, that she did not receive for an entire year. Defendant seeks to create a fiction, completely unwarranted by anything in the statute, that plaintiff's lost income was something other than what it actually was.

Defendant's position is not even substantively consistent with the Attorney General opinion upon which it relies,[2] at least when that opinion is read as a whole instead of as an isolated excerpt. Defendant correctly observes that the statute is intended to compensate an injured person for actual loss of income, not a loss of

[2] Attorney General opinions are not binding on the courts and are not even of certain effect on any governmental agencies. *Danse Corp v Madison Hts*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002). We do not purport to endorse or criticize OAG, 1979-1980, No 5673, p 684 (April 1, 1980), now, but rather discuss it solely because it was discussed by the parties.

earning capacity. See *Ouellette v Kenealy*, 141 Mich App 562, 564-565; 367 NW2d 353 (1984). In OAG, 1979-1980, No 5673, p 684 (April 1, 1980), the Attorney General opined that when a teacher is injured and unable to work during the summer, he or she is not entitled to payment of no-fault benefits. This is an obvious conclusion: unless the teacher teaches summer school or otherwise performs work over the summer, the teacher cannot have lost income from work that he or she would have performed.

Defendant, however, seeks to extrapolate too much from this opinion. The opinion correctly notes in passing that the teacher's loss "would be on the basis of the actual loss for the time during which the teacher is unable to work as a teacher." *Id*. at 687. In contrast to the situation under discussion in the Attorney General opinion, plaintiff here *had* actual work loss. And as a direct result of that actual work loss, she lost 26 paychecks' worth of income over a year. Defendant's attempt to rewrite what plaintiff's income would have been is at odds with reality and with MCL 500.3107(1)(b), which seeks to compensate her for *income* lost *as a consequence of* work lost.

The trial court correctly interpreted MCL 500.3107(1)(b) and correctly applied it to the facts of this case.

Affirmed. Plaintiff, being the prevailing party, may tax costs.

PEOPLE v CAMERON

Docket No. 293119. Submitted November 9, 2010, at Detroit. Decided January 4, 2011. Approved for publication February 15, 2011, at 9:10 a.m.

Stanley W. Cameron was charged with domestic violence and tried by a jury in the Oakland Circuit Court. Before trial, the prosecution sought a ruling permitting it to introduce evidence of defendant's prior bad acts involving the victim and another woman. The court, John J. McDonald, J., ruled that the evidence was admissible. At trial, the jury heard evidence that each woman had been hit by defendant while she had been his girlfriend, and the jury found defendant guilty. Defendant appealed.

The Court of Appeals *held*:

1. MCL 768.27b allows a trial court to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the requirements of MRE 403. The Legislature intended that in domestic violence cases, other acts of domestic violence committed by the defendant are admissible because a complete picture of the defendant's history might shed light on the likelihood that a given crime was committed. The trial court properly held under MRE 403 that any prejudicial effect of admitting the evidence that the defendant had previously committed domestic assault against the victim and another woman did not substantially outweigh the probative value of the evidence and did not abuse its discretion by admitting the evidence because it was relevant to the victim's credibility, it was relevant to show that defendant had acted violently toward the victim, and it demonstrated that his actions were not accidental. The testimony, along with the other proofs at trial, was sufficient to support the jury's verdict.

2. For purposes of this case, in which the victim was an ex-girlfriend, the relevant elements of a domestic assault offense include (1) the commission of an assault or an assault and battery and (2) a dating relationship between the parties. Defendant denied that an assault or an assault and battery occurred. A battery is an intentional, unconsented to, and harmful or offensive touching of the person of another or of something closely con-

nected with the person. It does not matter whether the touching caused an injury. An assault is an attempt to commit a battery or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. Every battery necessarily includes an assault because a battery is the very consummation of the assault. Intent may be inferred from all the facts and circumstances. Only minimal evidence from which intent may be inferred need be presented. The evidence supported an inference that defendant intended to commit an assault or an assault and battery against the victim, and sufficient evidence existed to support the verdict.

3. The verdict was not against the great weight of the evidence.

Affirmed.

1. CRIMINAL LAW — DOMESTIC VIOLENCE — EVIDENCE — PRIOR BAD ACTS.

MCL 768.27b allows trial courts to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the requirements of MRE 403; under MRE 403 the reviewing court must first decide if the evidence was unfairly prejudicial and then weigh the probativeness or relevance of the evidence against the unfair prejudice to determine whether any prejudicial effect substantially outweighed the probative value of the evidence.

2. ASSAULT AND BATTERY — DOMESTIC VIOLENCE — ELEMENTS OF BATTERY — ELEMENTS OF ASSAULT.

A violation of the domestic violence statute requires the commission of an assault or an assault and battery; a battery is an intentional, unconsented to, and harmful or offensive touching of the person of another or of something closely connected with the person; it does not matter whether the touching caused an injury; every battery includes an assault; an assault is an attempt to commit a battery or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery; intent may be inferred from all the facts and circumstances, and only minimal circumstantial evidence from which intent may be inferred need be presented (MCL 750.81[2]).

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *John S. Pallas*, Chief, Appellate Division, and *Kathryn G. Barnes*, Assistant Prosecuting Attorney, for the people.

Law Offices of Robert J. Boyd, III, P.C. (by *Robert J. Boyd, III*), for defendant.

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM. Defendant Stanley Wayne Cameron appeals by right his conviction for domestic violence resulting from the assault and battery of his ex-girlfriend, Kristie Yacheson. The trial court found Cameron guilty of domestic violence (third offense).[1] The trial court subsequently sentenced Cameron as a second-offense habitual offender[2] to six months to three years in prison. We affirm.

I. BASIC FACTS

A. DOMESTIC VIOLENCE INCIDENT

During the early morning hours of September 19, 2008, Cameron allegedly abused his ex-girlfriend, Kristie Yacheson. Cameron and Yacheson had lived together and dated off and on from October 2005 until September 2008. At the time of incident, however, Yacheson lived alone in an apartment on 14 Mile Road in the City of Royal Oak.

On the evening of September 18, 2008, Yacheson invited several friends to her apartment. Cameron sent Yacheson a text message asking if he could come over. Although a court order prohibited Cameron from being at Yacheson's apartment, Yacheson allowed Cameron to visit because he was acting nice and because she still loved him. Yacheson sent Cameron a text message saying he could come over as long as he behaved appropriately. Cameron asked Yacheson if she had any

[1] See MCL 750.81(4).

[2] See MCL 769.10.

food, and she replied that she did not. Yacheson did not ask Cameron to bring food over, and she did not expect him to bring food. However, when Cameron arrived about 8:00 p.m., he brought some food and beer with him. Because she felt safe with her other friends present, Yacheson let Cameron into her apartment.

Once inside the apartment, Cameron took the food and beer into the kitchen, placed at least one of the beers into the freezer, and began cooking dinner for everyone. At first, Cameron behaved appropriately. However, once everyone started drinking, Cameron's demeanor changed. Yacheson had two or three beers, a couple of shots of whiskey, and a shot or two of brandy. Cameron drank about the same amount, and he began to show signs of intoxication. Yacheson became increasingly concerned about Cameron's behavior because she knew from past experience that Cameron sometimes became violent when he drank.

At one point, Yacheson and Cameron entered the kitchen while Yacheson's friends remained in the living room. While in the kitchen, Yacheson and Cameron began arguing because Yacheson suggested that Cameron slow down his drinking. Eventually, the arguing turned into yelling, and Yacheson told Cameron to leave her apartment. Cameron opened the freezer to retrieve the beer that he brought, but Yacheson said no, and she slammed the freezer shut. Cameron allegedly then pushed Yacheson twice. The second time that Cameron allegedly pushed Yacheson, he pushed her against the refrigerator and stove with enough force to knock the refrigerator and stove askew. Yacheson then tried to push Cameron away, and Cameron allegedly punched or jabbed her in the stomach. Yacheson told her friends in the other room to call 911. Again, Yacheson told Cam-

eron to leave, and she pushed Cameron out the door of her apartment. As Cameron exited, the police arrived.

Officer Donald Scher of the Royal Oak Police Department arrived at Yacheson's apartment at 1:06 a.m. on September 19, 2008.[3] The dispatch informed Officer Scher that a no-contact order prohibited Cameron from being near Yacheson's home. As Officer Scher approached the apartment building, he saw Cameron leaving the premises on the sidewalk. Officer Scher recognized Cameron from prior police calls at the apartment. When Officer Scher yelled for Cameron to stop, Cameron ducked into a locked stairwell at the end of the apartment building. Officer Scher walked around the building to see where Cameron might exit.

Meanwhile, Officer Kathy Szydlowski of the Royal Oak Police Department, who arrived about the same time as Officer Scher, spoke with Yacheson. Officer Szydlowski observed Yacheson crying hysterically. Officer Szydlowski also observed that Yacheson appeared very frightened of Cameron.

When Officer Scher returned to the front of the building, Yacheson pointed out the direction in which she had seen Cameron leaving. Officer Scher spotted Cameron walking westbound away from the building. Again, Officer Scher called out for Cameron to stop, but Cameron began walking faster. Officer Scher lost sight of Cameron as he passed the corner of the building. Officer Scher gave chase, and as he rounded the corner of the building, he heard branches moving in a nearby evergreen tree. He saw Cameron trying to hide under the branches of the tree. Officer Scher radioed that he had found the suspect, and then he arrested Cameron.

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[3] At the time of trial, Officer Scher was unavailable to testify, so a redacted version of his preliminary examination testimony was read into the record without objection.

Cameron struggled as Officer Scher tried to handcuff him, and Officer Scher had to use pepper spray on him. Officer Szydlowski joined Officer Scher and assisted him in handcuffing Cameron.

B. VICTIM'S STATEMENTS TO THE POLICE

After Officer Scher placed Cameron into the back of the police car, Officer Szydlowski interviewed Yacheson.[4] Officer Szydlowski observed that Yacheson appeared to be very upset and that she remained upset throughout the interview. Yacheson told Officer Szydlowski that she had some friends over, she heard a sound at the door, and Cameron opened the door and came into the apartment. Yacheson also told Officer Szydlowski that Cameron charged toward her, backed her into the kitchen, and then pushed her against the refrigerator several times. Yacheson stated that although she tried to get away, Cameron grabbed her from behind and pushed the front of her body against the refrigerator. Yacheson said that she yelled for her friend to call the police, and when Cameron heard that the police were coming, he left the apartment. Yacheson also said that a no-contact order barred Cameron from contacting her, which Officer Szydlowski's dispatcher verified. Officer Szydlowski asked Yacheson to write out a statement, and she did so.

The incident left Yacheson sore, but she did not display any obvious or visible injuries. During her investigation, Officer Szydlowski did not observe any disarray or signs of a struggle in the kitchen, nor did she see any signs of injury on Yacheson. Furthermore, Yacheson did not tell Officer Szydlowski that she had

[4] The prosecution filed a pretrial notice of intent to present evidence of the victim's statements under MCL 768.27c.

invited Cameron to come over to her apartment earlier in the evening, that he had brought groceries and cooked dinner, and that he had been there for several hours.

At trial, Officer Szydlowski testified that she wanted to ask Yacheson more questions, but Yacheson's extreme emotional state had rendered her incapable of giving any more information at the scene.

C. PRETRIAL MOTION TO INTRODUCE PRIOR-BAD-ACTS EVIDENCE

On October 20, 2008, pursuant to MCL 768.27b, the prosecutor sought a ruling permitting it to introduce evidence of prior bad acts involving Cameron and Yacheson, as well as Cameron and his ex-girlfriend, Pamela Ponder. Over defense counsel's objection, the trial court ruled that the prosecutor could introduce other bad-acts evidence at trial to show Cameron's character.

D. PRIOR-BAD-ACTS EVIDENCE PRESENTED AT TRIAL

1. PRIOR ACTS AGAINST YACHESON

At trial, Yacheson testified that Cameron had previously physically attacked her. On March 5, 2006, when Yacheson and Cameron lived at the Admiral Hotel in Clinton Township, Cameron punched her on the side of her head, and she fell to the ground. Cameron grabbed Yacheson's cell phone so that she could not call 911, and he broke her phone when he threw it aside. Cameron told Yacheson that he would kill her if she called the police. He then stomped on her and repeatedly hit her. He called her a "whore" and other names as he hit her. Yacheson called the police.

Yacheson also testified that four additional incidents occurred between June 2006 and May 2008. In

June 2006, Yacheson lived at the Eastland Hotel in Eastpointe. On June 16, 2006, as Yacheson and Cameron walked outside, Yacheson said hello to a male friend. Cameron then punched the side of Yacheson's head. Another incident occurred on June 29, 2006, when Yacheson and Cameron started arguing about Yacheson's cell phone. Cameron demanded that Yacheson hand over the memory card for her phone, and Yacheson refused. Cameron then punched her. The fourth incident occurred on January 16, 2008, when Yacheson lived at the apartment in Royal Oak. Cameron wanted to see Yacheson, but she would not let him enter the apartment. Cameron, who had been drinking, forced his way in through a screen door to get into the apartment. Cameron then forced his way into the bedroom, where Yacheson had barricaded herself, and he took Yacheson's phone away from her. Cameron punched her in the face. The fifth incident occurred on May 16, 2008, when Cameron came into Yacheson's apartment and punched her. When Yacheson tried to call the police, Cameron broke her flip phone in half. The neighbors called the police. At trial, Yacheson testified that she had stayed in the off-and-on relationship with Cameron despite the assaults because he apologized each time and because she loved him.

2. PRIOR ACTS AGAINST PONDER

At trial, the prosecutor also elicited testimony that Cameron had also abused another ex-girlfriend. Pamela Ponder testified that she dated Cameron for a few months in 2001. In May 2001, she told Cameron that she wanted to end their relationship. Cameron reacted angrily.

Several other incidents occurred within a week of the breakup. During one incident, Cameron accused Ponder of seeing another man. Cameron hit her on the chin with an open hand. Another incident occurred when Ponder picked up her six-year-old son from school. Ponder had a male friend with her. Because it was warm, Ponder rolled down the windows of her truck. Cameron suddenly ran up and punched Ponder in the throat. A third incident occurred on May 7, 2001. Cameron threw a frozen beer can at Ponder's face. The impact broke her nose and broke some of her teeth.

E. JURY VERDICT

After hearing the evidence, the jury found Cameron guilty of domestic violence.[5] The trial court sentenced Cameron on May 4, 2009. The recommended minimum sentence under the sentencing guidelines ranged from 2 to 21 months in prison. Defense counsel asked for a minimum sentence of 10 months in prison, to be served concurrently. As previously stated, the trial court sentenced Cameron, as a second-offense habitual offender, to six months to three years in prison for domestic violence (third-offense) to be served consecutively to the sentence that Cameron was already serving.[6] Cameron now appeals.

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[5] Before trial, the prosecutor had dismissed additional charges of malicious destruction of police property, MCL 750.377b, and illegal entry, MCL 750.115.

[6] Cameron was released on bond at the time of the instant offense. In fact, on the same day Cameron was arraigned in this case, he was sentenced in Oakland Circuit Court Case No. 2008-221126-FH to one to two years in prison for interfering with electronic communications and one year for domestic violence (second offense). Those offenses involved the same victim as this case. Cameron committed the offense in this case while awaiting sentencing in the earlier case.

II. PRIOR-BAD-ACTS EVIDENCE

A. STANDARD OF REVIEW

Cameron argues that the trial court should have excluded evidence of his prior bad acts because it was unfairly prejudicial under MRE 403. Cameron further argues that the jury convicted him of domestic violence based on Yacheson and Ponder's testimony about prior incidents where Cameron hit them. Cameron claims that the jury essentially heard Yacheson and Ponder's testimony and then improperly concluded that because Cameron assaulted these women in the past, he must have assaulted Yacheson this time. Cameron contends that, as a result, the trial court reversibly erred when it determined that the prior-bad-acts evidence could be introduced at trial because the prejudicial effect outweighed the probative value of the evidence.

We will not question a trial court's decision whether to admit evidence absent an abuse of discretion.[7] The abuse of discretion standard involves more than just a difference of opinion.[8] "Further, a trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion."[9]

B. LEGAL STANDARDS

During the preliminary hearing on October 9, 2008, Yacheson testified that Cameron had a pending domestic violence charge for a prior confrontation between Cameron and Yacheson. Subsequent discovery revealed additional incidents between Cameron and Yacheson,

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[7] *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

[8] *Id*.

[9] *Id*.; *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

and Cameron and his ex-girlfriend Ponder. Before trial, the prosecutor moved to introduce these prior bad acts at trial. Over defense counsel's objection, the trial court granted the prosecutor's motion and determined that Cameron's prior bad acts of domestic violence were admissible under MCL 768.27b. MCL 768.27b(1) states:

> Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if not otherwise excluded under Michigan rule of evidence 403.[10]

The language of MCL 768.27b clearly indicates that trial courts have discretion "to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403."[11] In analyzing a sister statute,[12] this Court has previously acknowledged that the Michigan Legislature intended to allow juries "the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords."[13] MCL 768.27a deals primarily with prior-bad-acts evidence involving crimes

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[10] MCL 768.27b(5)(a)(*i*) and (*ii*) define "domestic violence" as, *inter alia*, "[c]ausing or attempting to cause physical or mental harm to a family or household member," or "[p]lacing a family or household member in fear of physical or mental harm." Further, MCL 768.27b(5)(b)(*iv*) defines "family or household member" as any "individual with whom the person has or has had a dating relationship."

[11] *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007); see also *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008) (noting that, unlike MRE 404(b)(1), MCL 768.27b only requires a showing of "the transparency of a person's character as justification for admitting evidence").

[12] MCL 768.27a.

[13] *Pattison*, 276 Mich App at 620 (noting that legislatively enacted MCL 768.27a alters the court-created MRE 404(b)(1) rule of admissibility for

against minors.[14] However, because of the similarities in the language of MCL 768.27a and 768.27b, we believe that the Michigan Legislature intended the same policy to apply to domestic violence situations under MCL 768.27b. Thus, prior-bad-acts evidence of domestic violence can be admitted at trial because "a full and complete picture of a defendant's history . . . tend[s] to shed light on the likelihood that a given crime was committed."[15]

C. APPLYING MCL 768.27b TO CAMERON'S PRIOR BAD ACTS

In this case, the prosecutor charged Cameron with domestic violence pursuant to MCL 750.81(2).[16] Then, to support the domestic violence charge, the prosecutor moved to admit evidence of Cameron's prior bad acts under MCL 768.27b. The statutory language and policy considerations of MCL 768.27b clearly demonstrate the Michigan Legislature's intent to allow prior-bad-acts evidence to be introduced at trial as long as the evidence satisfies the "more probative than prejudicial" balancing test of MRE 403, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or

other crimes or wrongs, but it does not violate separation of powers because it is substantive in nature); see also *Shultz*, 278 Mich App at 778-779.

[14] MCL 768.27a(1) provides that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."

[15] *Pattison*, 276 Mich App at 620.

[16] As noted in the information filed by the prosecution, Cameron was initially charged under MCL 750.81(2), but his charge was enhanced to MCL 750.81(4) because this incident was his third offense.

by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Accordingly, this Court must make two distinct inquires under the balancing test of MRE 403. First, this Court must decide whether introduction of Cameron's prior-bad-acts evidence at trial was unfairly prejudicial. Then, this Court must apply the balancing test and "weigh the probativeness or relevance of the evidence" against the unfair prejudice.[17] Upon completion of this second inquiry, this Court can determine whether the trial court abused its discretion in allowing Cameron's prior bad acts into evidence.

Under the first inquiry, we conclude that the trial court's decision to allow evidence of Cameron's prior bad acts did not unfairly prejudice Cameron at trial. The "unfair prejudice" language of MRE 403 " 'refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.' "[18] Moreover, admission of "[e]vidence is unfairly prejudicial when- . . . [the danger exists] that marginally probative evidence will be given undue or preemptive weight by the jury."[19] However, the Michigan Supreme Court also recognizes that the prosecution does not have to use the least prejudicial evidence to make out its case.[20] In this case, the prejudicial effect of other-acts evidence did not stir such passion as to divert the jury from rational

[17] *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

[18] *Id.* at 452, quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984); see also *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995) (noting that "[a] party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion").

[19] *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

[20] *Fisher*, 449 Mich at 452.

consideration of Cameron's guilt or innocence of the charged offenses.[21] In fact, the trial court minimized the prejudicial effect of the bad-acts evidence by instructing the jury that the issue in this case was whether Cameron committed the charged offense.

Under the second inquiry, we conclude that any prejudicial effect of the trial court's decision to allow evidence of Cameron's prior bad acts did not substantially outweigh the probative value of the evidence. A trial court admits relevant evidence to provide the trier of fact with as much useful information as possible.[22] Here, the trial court found that Cameron's prior bad acts were relevant and therefore admissible to establish Yacheson's credibility.[23] The trial court also found that Cameron's actions were relevant to show that he acted violently toward Yacheson and that his actions were not "accidental" at the time of the incident. Additionally, the evidence of Cameron's actions on six separate occasions with Yacheson and on three separate occasions with Ponder demonstrated Cameron's propensity to commit acts of violence against women who were or had been romantically involved with him.

Therefore, Cameron's prior bad acts were relevant to the prosecutor's domestic violence charge under MCL 768.27b. Any prejudicial effect of admitting the bad-acts evidence did not substantially outweigh the probative value of the evidence, and the trial court did not abuse its discretion when it allowed Cameron's prior-bad-acts evidence to be introduced under MCL 768.27b.

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[21] See *People v Starr*, 457 Mich 490, 503; 577 NW2d 673 (1998).

[22] *People v Hampton*, 407 Mich 354, 367; 285 NW2d 284 (1979) (COLEMAN, C.J.).

[23] Relevant evidence is any fact that is of consequence to the determination of the action. *People v McKinney*, 410 Mich 413, 419; 301 NW2d 824 (1981).

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

As previously stated, on April 20, 2009, a jury found Cameron guilty of domestic violence (third offense).[24] Cameron argues that the prosecution failed to present sufficient evidence at trial to support a jury's conviction for domestic violence. When assessing a sufficiency-of-the-evidence argument, an appellate court will view the evidence in a light most favorable to the prosecution to determine if it would support a rational jury's finding that the elements had been proven beyond a reasonable doubt.[25] In applying this standard, a court must "draw all reasonable inferences and make credibility choices in support of the jury verdict."[26]

B. LEGAL STANDARDS

The charged offense, MCL 750.81(2), establishes the following guidelines for a domestic violence charge:

> Except as provided in subsection (3) or (4), an individual who assaults or assaults and batters his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

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[24] As noted in the information filed by the prosecution, Cameron was initially charged under MCL 750.81(2), but his charge was enhanced to MCL 750.81(4) because this incident was his third offense. The language of MCL 750.81(2) and MCL 750.81(4) is almost identical except that MCL 750.81(4) makes the domestic assault a felony punishable by imprisonment for not more than two years or a fine of not more than $2,500.

[25] *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

[26] *Id*. at 400.

The relevant elements of the charged domestic assault offense include (1) the commission of an assault or an assault and battery and (2) a dating relationship between the parties.[27] Cameron does not dispute that he had a dating relationship with Yacheson.[28] However, Cameron denies that an assault or an assault and battery took place on the night of the incident.

The courts have defined a battery as " 'an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.' "[29] It does not matter whether the touching caused an injury.[30] Further, the courts have defined an assault as "an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery."[31] Thus, every battery necessarily includes an assault because a battery is the very "consummation of the assault."[32]

C. APPLYING THE STANDARDS

In this case, Yacheson testified that Cameron pushed her twice. Yacheson stated that the second time that Cameron pushed her, Cameron pushed her against the refrigerator and stove with enough force to knock the refrigerator and stove askew. Yacheson also testified

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[27] See MCL 750.81(4); CJI2d 17.2a.

[28] In addition, Yacheson's testimony at preliminary hearing established that she and Cameron had an on-and-off dating relationship.

[29] *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005) (citations omitted); CJI2d 17.2a(2).

[30] *People v Terry*, 217 Mich App 660, 663; 553 NW2d 23 (1996); CJI2d 17.15.

[31] *Starks*, 473 Mich at 234; CJI2d 17.2a(2).

[32] *Tinkler v Richter*, 295 Mich 396, 401; 295 NW 201 (1940) (citation and quotation marks omitted); *Terry*, 217 Mich App at 663.

that she tried to push Cameron away, and Cameron allegedly punched or jabbed her in the stomach. Officer Szydlowski testified that she arrived on the scene and observed Yacheson crying hysterically. Officer Szydlowski testified that Yacheson appeared very frightened of Cameron.

This Court previously determined that a defendant's "actions sometimes speak louder than words."[33] Intent may be inferred from all the facts and circumstances.[34] Further, "[a] defendant's intent may be inferred from his acts."[35] Because of the inherent difficulty of proving a defendant's state of mind, only minimal circumstantial evidence from which intent may be inferred need be presented.[36] Therefore, we conclude that the evidence satisfies the elements of assault or an assault and battery under MCL 750.81(2). Cameron's pushing, punching, or jabbing Yacheson certainly constituted an intentional, unconsented, and harmful or offensive touching. Further, regardless of how the touching started, Cameron clearly intended to commit an intentional touching or place Yacheson in apprehension of an intentional touching. Accordingly, we conclude that the evidence supported an inference that Cameron intended to commit an assault or an assault and battery against Yacheson.

On appeal, Cameron argues that insufficient evidence existed to support the jury's guilty verdict. However, at trial, Cameron did not testify and did not call

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[33] *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985) (citations and quotation marks omitted).

[34] *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001); *Strong*, 143 Mich App at 452.

[35] *People v Ng*, 156 Mich App 779, 785; 402 NW2d 500 (1986).

[36] *Strong*, 143 Mich App at 452; *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

any witnesses to contradict the prosecution witnesses' testimony. The Michigan Supreme Court has long recognized that "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses."[37] In this case, the jury listened to Yacheson's testimony and found it to be credible. Thus, when viewing the evidence in a light most favorable to the prosecution, a rational jury could find that the elements of a domestic assault had been proven beyond a reasonable doubt.[38] On appeal, Cameron argues that Yacheson invited Cameron over to her apartment, he brought food, he prepared the food, and he began drinking. Cameron claims that at some point, he voluntarily decided to leave Yacheson's apartment. Cameron also argues that when he returned to the kitchen to retrieve his beer from the freezer, Yacheson slammed the freezer door on his hand. Cameron asserts that he pushed Yacheson out of the way as he exited the apartment. Again, Cameron never elicited this testimony during the trial to rebut the evidence against Cameron. Thus, the jury presumably decided its verdict based on Yacheson's testimony about the incident. We conclude that sufficient evidence existed to support the jury's guilty verdict.

IV. GREAT WEIGHT OF THE EVIDENCE

A. STANDARD OF REVIEW

Cameron argues that his conviction should be reversed and vacated because the jury's verdict went against the great weight of the evidence. An appellate court will review a properly preserved great-weight issue by deciding whether "the evidence preponder-

[37] *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

[38] *Nowack*, 462 Mich at 399-400.

ates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand."[39] However, when a party fails to preserve a great-weight issue for appeal, an appellate court will look for "plain error affecting the defendant's substantial rights."[40]

B. LEGAL STANDARDS

An appellate court will only review issues that are properly raised and preserved at trial.[41] The preservation requirement induces litigants "to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice."[42] Generally, an issue is not properly preserved unless a party raises the issue before the trial court and the trial court addresses and decides the issue.[43] To preserve a great-weight claim, a party must move for a new trial in the trial court.[44] An appellate court will review a properly preserved great-weight issue by deciding whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.[45]

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[39] *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003) (citations omitted).

[40] *Id*. at 218.

[41] *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994); *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008).

[42] *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997); see also *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006).

[43] *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007); *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

[44] *People v Buck*, 197 Mich App 404, 416; 496 NW2d 321 (1992).

[45] *Lemmon*, 456 Mich at 642.

In this case, Cameron did not move for a new trial, so he failed to preserve the great-weight issue for appellate review. Therefore, we can only review Cameron's great-weight argument for plain error affecting his substantial rights. Any plain error that affects a party's substantial rights may be considered even though it was not brought to the court's attention.[46] A constitutional right "may be forfeited by a party's failure to timely assert that right."[47] To avoid forfeiture, the defendant bears the burden to show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., the error affected the outcome of the lower court proceedings.[48] Further,

> once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error . . . " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."[49]

C. APPLYING THE STANDARDS

As previously stated, testimony of the prosecution witnesses provided evidence of a domestic assault or assault and battery. At trial, Yacheson testified that Cameron pushed her and punched or jabbed her in the stomach. Additionally, Officer Szydlowski testified that she observed Yacheson crying hysterically and that Yacheson appeared to be very frightened of Cameron.

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[46] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), quoting FR Crim P 52(b).

[47] *Carines*, 460 Mich at 763, citing *United States v Olano*, 507 US 725, 731; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[48] *Carines*, 460 Mich at 763.

[49] *Id.*, quoting *Olano*, 507 US at 736-737 (second alteration in *Carines*).

The prosecutor argues that this testimony supports an inference that Cameron intentionally committed an assault or assault and battery against Yacheson and that sufficient evidence exists to allow a rational jury to find that the elements of a domestic assault had been proven beyond a reasonable doubt.

In contrast, Cameron did not present any witnesses to contradict the prosecution's evidence. The jury heard all of the testimony, the jury deliberated, and then the jury found Cameron guilty of domestic violence. Now, on appeal, Cameron argues that his conviction should be reversed and vacated because the evidence presented at trial does not support a guilty verdict. Cameron claims that Yacheson invited him over to her apartment, he brought food, he prepared the food, and he began drinking. Cameron further states that at some point, he voluntarily decided to leave Yacheson's apartment and that he returned to the kitchen to retrieve his beer from the freezer. Cameron alleges that Yacheson slammed the freezer door on his hand and then he pushed Yacheson out of the way as he exited the apartment.

Despite his assertions to the contrary, we believe that Cameron has failed to show that an error occurred, that the error was clear and obvious, or that plain error prejudiced his rights by affecting the outcome of the trial. Further, to the extent that Cameron argues that Yacheson's statements to the police were inconsistent with her testimony at trial, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial."[50] We conclude that the evidence supported the jury's finding that Cameron intentionally committed an assault or assault and bat-

[50] *Musser*, 259 Mich App at 219, quoting *Lemmon*, 456 Mich at 647.

tery against Yacheson and that the jury's verdict was not against the great weight of the evidence.

V. CONCLUSION

The trial court did not abuse its discretion when it allowed evidence of Cameron's prior bad acts to be introduced at trial under MCL 768.27b. Further, when viewing the evidence in a light most favorable to the prosecution, a rational jury could find that the elements of a domestic assault had been proven beyond a reasonable doubt. Thus, sufficient evidence existed to support a jury's guilty verdict. In addition, Cameron failed to preserve his great-weight argument for appeal, and Cameron has failed to show that a plain error occurred at trial. Accordingly, the jury's verdict was not against the great weight of the evidence or manifestly unjust.

We affirm.

In re SMITH

Docket No. 299300. Submitted February 9, 2011, at Detroit. Decided February 15, 2011, at 9:15 a.m. Amended by order entered March 1, 2011, to change from an unpublished opinion per curiam to an opinion per curiam for publication. 291 Mich App 801.

The Department of Human Services petitioned to terminate the parental rights of the father of G. Smith, a minor, in the Kent Circuit Court, Family Division. The court, Daniel V. Zemaitis, J., entered an order terminating the father's parental rights pursuant to MCL 712A.19b(3)(g), (j), and (*l*). Respondent appealed, contending that clear and convincing evidence did not support the order and that termination was improper because he was incarcerated and petitioner did not provide him with services for reunification.

The Court of Appeals *held*:

Petitioner failed to meet its statutory duty to facilitate reunification between respondent and the child. In fact, petitioner made no attempt to allow them to reunite, but focused its efforts solely on termination. Reversal is not required, however, because the trial court did not clearly err by finding that grounds for termination under MCL 712A.19b(3)(*l*) were established by the clear and convincing evidence showing that the child's sister had previously been the subject of a child-protective proceeding and that respondent's parental rights to the child's sister had been involuntarily terminated. Given the absence of any bond between respondent and the child, the trial court did not clearly err by finding that termination of respondent's parental rights was in the child's best interests under MCL 712A.19b(5).

Affirmed.

John P. Pyrski for defendant.

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM. Respondent appeals as of right an order terminating his parental rights to his minor child pursuant to MCL 712A.19b(3)(g), (j), and (*l*). We affirm.

Respondent argues that the trial court's order terminating his parental rights was not supported by clear and convincing evidence, but he does not directly challenge the trial court's determination that grounds for termination were established under MCL 712A.19b(3)(g), (j), and (*l*). Relying on *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), he contends that termination was improper because he was incarcerated and petitioner, the Department of Human Services (DHS), did not provide him with services for reunification. We agree and hold that petitioner failed to meet its statutory duty to facilitate reuniting respondent and his child. Our Supreme Court has held "[t]he state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated." *Id.* at 152. Unfortunately for respondent, petitioner misunderstood the extent of its obligation to an incarcerated father and determined that it was under no duty to facilitate reunification.

Petitioner removed respondent's son from the care of the child's mother on October 13, 2009. The child's mother identified respondent as the child's father. Petitioner learned that respondent was being held in the Kent County jail awaiting sentencing, but no DHS employee visited respondent any time during the proceedings regarding his child's care. Petitioner chose to communicate with respondent solely through letters, despite acknowledging that there were no barriers to face-to-face contact. Petitioner never believed that reunification was an option. Petitioner's initial correspondence with respondent clearly stated the case manager's belief that respondent's incarceration rendered "working on a treatment plan" with the DHS "not possible." The case manager testified that she would not provide services to respondent. As a result, there was never a parent-agency agreement proposed for respondent.

Petitioner believed termination to be the only option in this case and recommended to respondent that he voluntarily release his rights before he was determined to be the child's legal father. Petitioner repeatedly asked respondent to release his rights from the time of their initial communication, even though respondent gave no indication that he wished to do so. Petitioner refused to make efforts that were not aimed toward termination, and the case manager focused the majority of her correspondence with respondent on the releasing of his rights. Even after establishing that respondent wished to parent his son, little was done to provide services to facilitate this. Respondent informed petitioner that he had completed a number of substance-abuse-cessation goals and that his attorney had proof of his progress, but petitioner chose to ignore this information rather than use it in forming a plan for respondent. The record clearly shows that petitioner made no attempt to allow for respondent's reuniting with his child and instead focused its efforts solely on termination.

Nonetheless, petitioner's apathetic approach to respondent's right to services does not require reversal. Pursuant to MCL 712A.19a(2)(c), the prior involuntary termination of parental rights to a child's sibling is a circumstance under which reasonable efforts to reunite the child and family need not be made. It is undisputed that the child's sister was previously the subject of a child-protective proceeding and that respondent's parental rights to the child's sister were involuntarily terminated. " 'Reasonable efforts to reunify the child and family must be made in *all* cases' except those involving aggravated circumstances not present in this case." *Mason*, 486 Mich at 152 (citation omitted). We find it incongruous that the prior termination of a parent's rights to another child is treated the same as if the parent had murdered the other child—both result

in a blanket grant of authority to petitioner to abdicate responsibility for so much as a token effort—irrespective of whether the parent might someday reform his or her life. However, the Legislature may make policy choices that seem, from our perspective, unwise. *People v McIntire*, 461 Mich 147, 159; 599 NW2d 102 (1999). Therefore, the trial court did not clearly err by finding that grounds for termination under MCL 712A.19b(3)(*l*) were established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K).

Further, given the absence of any bond between respondent and the child, the trial court did not clearly err by finding that termination of respondent's parental rights was in the child's best interests. MCL 712A.19b(5).

Affirmed.

PRESIDENT INN PROPERTIES, LLC v CITY OF GRAND RAPIDS

Docket No. 294452. Submitted February 1, 2011, at Grand Rapids. Decided February 17, 2011, at 9:00 a.m.

President Inn Properties, L.L.C., filed a petition in the Tax Tribunal contesting the assessed valuations of two parcels of property on which petitioner operates a hotel in respondent city of Grand Rapids. Following a hearing, a hearing referee issued a proposed opinion and judgment that adopted the valuations of petitioner's expert. Respondent filed objections to the proposed opinion and judgment. The Tax Tribunal ruled that the hearing referee had improperly given more credit to the testimony and appraisals of petitioner's appraiser, but otherwise adopted the hearing referee's findings of fact and conclusions of law, including the referee's finding that respondent's evidence that the value of each of the properties was greater than that listed on the tax rolls should be discounted. The tribunal affirmed respondent's assessments for the subject properties and modified the referee's proposed opinion and judgment and adopted the modified proposed opinion and judgment as the tribunal's final decision in the case. Petitioner appealed.

The Court of Appeals *held*:

1. Tax Tribunal proceedings are de novo in nature and the tribunal has a duty to make an independent determination of true cash value. The tribunal may not automatically accept the valuations on the tax rolls, even when the petitioner fails to prove by the greater weight of the evidence that the challenged assessment is wrong. The tribunal has a duty to determine the most accurate valuation under the individual circumstances of the case.

2. The Tax Tribunal did not err by admitting respondent's exhibit E for the limited purpose of impeaching petitioner's appraiser.

3. The Tax Tribunal, in fulfilling its statutory responsibility, may make its own determinations regarding the credibility of witnesses and the weight to be assigned to evidence in the record. Therefore, the tribunal did not err by reconsidering the issues regarding the credibility of petitioner's appraiser and the weight to be given to the evidence provided by the appraiser.

4. The Legislature, although providing a broad framework and numerous factors to be considered, has not specified methods of valuation that assessors must employ. Any method for determining true cash value that is recognized as accurate and reasonably related to fair market valuation is an acceptable indicator of true cash value. A valuation method is wrong only if it does not lead to the most accurate determination of the true cash value or fair market value of the taxable property. The tribunal may correlate, reconcile, and weigh valuations derived under various approaches with the ultimate goal of considering all factors under the circumstances in determining the fair market value of the subject property.

5. Although the Tax Tribunal may not assume that the assessed valuation of property is valid, the tribunal may adopt the assessed valuation stated on the tax rolls as the tribunal's independent finding of true cash value when competent and substantial evidence supports doing so.

6. The Tax Tribunal did not abdicate its responsibility to determine independently the subject properties' true cash value when it adopted the properties' assessed valuation on the tax rolls because there was competent and substantial evidence in the record supporting the tribunal's determination. The tribunal's valuation, which was within the range of valuations in evidence, was supported by competent and material evidence and must be affirmed.

7. Any error in the form of the tribunal's final opinion and judgment did not prejudice petitioner and does not require reversal. On remand, the Tax Tribunal must correct the two clerical errors in its final opinion and judgment identified by the Court of Appeals.

Affirmed and remanded for the correction of clerical errors.

1. TAXATION — ADMINISTRATIVE LAW — TAX TRIBUNAL — APPEAL.

Review of decisions of the Tax Tribunal by the Court of Appeals is, in the absence of fraud, limited to determining whether the tribunal made an error of law or adopted a wrong principle; the factual findings of the tribunal are final provided that they are supported by competent and substantial evidence.

2. TAXATION — TAX TRIBUNAL — ASSESSMENTS — VALUATIONS.

The Tax Tribunal must determine the most accurate valuation under the individual circumstances of the case; even when a petitioner fails to prove by the greater weight of the evidence that

a challenged assessment is wrong, the tribunal may not automatically accept the valuation on the tax rolls and must make an independent valuation.

3. TAXATION — TAX TRIBUNAL — REVIEW OF HEARING REFEREES' DECISIONS — CREDIBILITY OF WITNESSES — WEIGHT OF THE EVIDENCE.

The Tax Tribunal, in considering a proposed decision of a hearing referee, may make its own determinations regarding the credibility of witnesses and the weight to be assigned to the evidence in the record.

4. TAXATION — TAX TRIBUNAL — VALUATION METHODS.

The Tax Tribunal is not obligated to accept the valuation figures or approach to valuation advanced by the parties; any method for determining true cash value that is recognized as accurate and reasonably related to fair market valuation is an acceptable indicator of true cash value; regardless of the valuation approach employed, the final value determination must represent the usual price for which the property would sell; a valuation method is wrong only if it does not lead to the most accurate determination of the property's true cash value or fair market value.

5. TAXATION — TAX TRIBUNAL — ASSESSED VALUATIONS — TRUE CASH VALUE.

A property's assessed valuation on the tax rolls carries no presumption of validity in Tax Tribunal proceedings regarding the valuation of the property; the Tax Tribunal may adopt the assessed valuation as its independent finding of true cash value when there is competent and substantial evidence supporting the valuation.

Peter N. Rigas for petitioner.

Catherine M. Mish, City Attorney, and *Nadine R. Klein*, Assistant City Attorney, for respondent.

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM. Petitioner appeals by right the final opinion and judgment of the Tax Tribunal establishing for the tax years 2004-2006 the true cash value (TCV), the state equalized value (SEV), and the taxable value (TV), of two parcels of property on which petitioner operates a hotel. We affirm but remand for correction of

clerical errors regarding the identification number of one parcel (41-14-05-276-009) and the 2006 TV of the other parcel ($678,864).

I. FACTUAL BACKGROUND

A hearing referee conducted a three-day hearing at which petitioner presented evidence that the TCV of each of the properties was less than the amount listed on the assessment rolls, and respondent presented evidence that the TCV of each of the properties was more than that listed on the assessment rolls. Because the hearing referee found petitioner's evidence and valuation method more persuasive than that of respondent, he issued a proposed opinion and judgment adopting the valuations of petitioner's expert. See MCL 205.726. Respondent filed objections to the hearing referee's proposed opinion and judgment. On review of the record and the parties' pleadings, the Tax Tribunal ruled that the hearing referee had improperly credited petitioner's appraiser, stating that two of the appraiser's appraisals should have been accorded little or no weight. The tribunal mainly discredited the two appraisals because the same appraiser had prepared a third appraisal for purposes of obtaining financing and it was strikingly different. But the tribunal otherwise adopted the hearing referee's findings of fact and conclusions of law, including the referee's finding that respondent's evidence that the value of each of the properties was greater than that listed on the tax rolls should also be discounted. The Tax Tribunal's findings read, in part:

> 5. Respondent's Exhibit E (Petitioner's 2002 Appraisal for Finance Purposes with Exhibits) was properly admitted into evidence. However, the POJ [the hearing referee's proposed opinion and judgment] failed to state

that Exhibit E was admitted solely for impeachment purposes. Although Exhibit E was not admitted for valuation purposes, the [hearing referee] still failed to take the appraisal into consideration in the rendering of its [sic] decision.

* * *

9. Ultimately, Petitioner's appraiser should have been awarded little credibility for the large differences in the two appraisals. The disparity in the two reports is not explained by the September 11th bombing of New York, the unemployment, the location or the factors that were not cited in the original appraisal that would not have changed given the short time span between the reports as asserted by Petitioner. The inconsistencies between the reports cast enough uncertainty that the Tribunal finds that Petitioner's December 31, 2003 appraisal is given very minimal weight.

10. The [hearing referee's] analysis of why Respondent's appraisal was given little weight is adopted. As such, the Tribunal finds that Respondent's assessments for the subject properties for the tax years at issue are affirmed. Petitioner failed to carry the burden of establishing the true cash value of the property. Conversely, Respondent failed to meet its burden of proving the subject property's assessments should be changed from that reflected on the tax rolls. Therefore, the true cash, state equalized, and taxable values for the subject property are as follows:

Parcel Number: 41-14-05-276-011

Year	TCV	SEV	TV
2004	$1,528,400	$764,200	$642,403
2005	$1,595,600	$797,800	$756,178
2006	$1,595, 600	$797,800	$672,293[1]

[1] The parties agree that this is an error and that the correct 2006 TV is $678,864.

Parcel Number: 41-14-05-276-001[2]

Year	TCV	SEV	TV
2004	$116,400	$58,200	$48,998
2005	$121,600	$60,800	$50,124
2006	$146,000	$73,000	$51,778

11. Given the above, the Tribunal modifies the Proposed Opinion and Judgment, as indicated herein, and adopts the modified Proposed Opinion and Judgment as the Tribunal's final decision in this case. *See* MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the modified Proposed Opinion and Judgment in this Final Opinion and Judgment.

Therefore,

IT IS ORDERED that the property's values for the 2004, 2005 and 2006 tax years shall be as set forth in this Final Opinion and Judgment. [Final Opinion and Judgment, pp 5-9 (Michigan Tax Tribunal Docket No. 310739, entered September 17, 2009).]

Petitioner appeals by right, MCL 205.753(1), asserting that the Tax Tribunal committed several errors of law and also made several erroneous factual findings.

II. STANDARD OF REVIEW

This Court's ability to review decisions of the Tax Tribunal is very limited. *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 665; 649 NW2d 760 (2002). Michigan's Constitution provides: "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valua-

[2] The parties agree that the correct parcel number is 41-14-05-276-009.

tion or allocation." Const 1963, art 6, § 28. Thus, this Court's "review of decisions of the Tax Tribunal, in the absence of fraud, is limited to determining whether the tribunal made an error of law or adopted a wrong principle; the factual findings of the tribunal are final, provided that they are supported by competent and substantial evidence." *Antisdale v Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984).

With respect to general valuation principles in the Tax Tribunal, the petitioner has the burden to establish the true cash value of property. MCL 205.737(3); *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 389; 576 NW2d 667 (1998). The burden of proof encompasses two concepts: "(1) the burden of persuasion, which does not shift during the course of the hearing; and (2) the burden of going forward with the evidence, which may shift to the opposing party." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 354-355; 483 NW2d 416 (1992). Nevertheless, because Tax Tribunal proceedings are de novo in nature, the Tax Tribunal has a duty to make an independent determination of true cash value. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 409. Thus, even when a petitioner fails to prove by the greater weight of the evidence that the challenged assessment is wrong, the Tax Tribunal may not automatically accept the valuation on the tax rolls. *Id.* at 409. Regardless of the method employed, the Tax Tribunal has the overall duty to determine the most accurate valuation under the individual circumstances of the case. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 485-486, 502; 473 NW2d 636 (1991).

This case also presents issues of statutory interpretation, which are questions of law that this Court

reviews de novo. *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628; 765 NW2d 31 (2009). Proper construction of a statute "begins by reviewing the text of the statute at issue; if the language is unambiguous, it is presumed that the Legislature intended the meaning plainly expressed, and judicial construction of the statute is not permitted." *Paris Meadows, LCC v Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010). Furthermore, "[n]othing may be read into a clear statute 'that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' " *Id*. (citation omitted).

III. ANALYSIS

Petitioner first argues that the Tax Tribunal erred as a matter of law and fact by stating in ¶ 5 of its final opinion and judgment that respondent's exhibit E was admitted into evidence. The record does not support petitioner's claim.

At the hearing before the hearing referee, respondent's exhibits were marked alphabetically and exhibit E was identified as a 2002 appraisal of the subject property prepared for petitioner by the same expert who testified for petitioner at the hearing and who also prepared two other appraisals (petitioner's exhibits 1 and 2) admitted into evidence for tax-valuation purposes. Respondent's attorney moved for the admission of exhibit E during the cross-examination of petitioner's appraiser "for purposes of impeachment, rebuttal, and to, for the witness's credibility." Petitioner's attorney objected on grounds of relevancy and also because respondent could impeach the witness by simply questioning him about his appraisals. The hearing referee ruled regarding respondent's exhibit E:

> [*Hearing Referee*]: As I said before, the respondent in this instance as to this witness is entitled to cross-examination. Part of cross-examination is to impeach the credibility of the witness.
>
> * * *
>
> [*Hearing Referee*]: Wait. And to that extent, this—let's put it this way: The admissibility is on the basis of its use in the impeachment of this witness.
>
> * * *
>
> [*Hearing Referee*]: Now, as to the ultimate value, it is not being considered for that purpose.

Thus, the record reflects that respondent's exhibit E was admitted for the limited purpose of impeaching petitioner's appraiser. This is the purpose for which the Tax Tribunal utilized exhibit E. The tribunal did not err as a matter of fact or law. That one page of exhibit E was admitted later in the hearing as part of another exhibit does not alter the fact that all of exhibit E had previously been admitted for the purpose of impeaching petitioner's appraiser.

Next, petitioner argues that the Tax Tribunal erred by revisiting the credibility of petitioner's appraiser and the weight assigned to his appraisals. We disagree.

Petitioner cites MCR 2.613(C) and caselaw for the proposition that appellate courts will defer to credibility determinations by the fact-finder. It is true that this Court will not assess witness credibility. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 407. Also, the weight given to the evidence is within the discretion of the Tax Tribunal. *Id*. at 404, 413. But petitioner fails to cite a statute, administrative rule, or appellate decision that has applied these principles in the context of the Tax Tribunal's performance of its statutory obligation

of considering and deciding issues presented in a hearing referee's proposed opinion and judgment. "A proposed decision of a hearing officer or referee shall be considered and decided by 1 or more members of the tribunal." MCL 205.726. Although petitioner's citation of analogous authority perhaps saves its argument from being abandoned, we conclude that petitioner's analogy fails in light of the statutory authority vested in the Tax Tribunal.

Section 26 of the Tax Tribunal Act, MCL 205.726, authorizes the Tax Tribunal to "appoint 1 or more hearing officers to hold hearings." Furthermore, except for proceedings in the residential property and small claims division of the tribunal, tribunal hearings "shall be conducted pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287 . . . ." MCL 205.726. "[T]he Tax Tribunal is under a duty to apply its expertise to the facts of a case and is not bound by either party's theories of valuation," and with respect to disputed issues, "it must follow the procedures in the Administrative Procedures Act . . . ." *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 400-401. This Court has also held in the context of a motion for rehearing under MCL 205.762(3) that the Tax Tribunal may not delegate its statutory responsibilities to hearing referees. *Shapiro Bag Co v Grand Rapids*, 217 Mich App 560, 563; 552 NW2d 185 (1996). Here, the statute providing for the appointment of hearing referees squarely places the responsibility on "1 or more members of the tribunal" to consider and decide "[a] proposed decision of a hearing officer or referee . . . ." MCL 205.726.

As noted, chapter 4 of the Administrative Procedures Act (APA) governs hearings in the Tax Tribunal, except those in the residential property and small claims

division. The APA provides that a "proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record." MCL 24.281(2). Moreover, the APA permits, except as limited by statute or rule, review de novo by the agency—here the Tax Tribunal—of a proposed decision. "On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing." MCL 24.281(3). See also MCL 205.734(1): "One or more members of the tribunal may hear and decide proceedings." And, see MCL 205.735(2): "A proceeding before the tribunal is original and independent and is considered de novo." Finally, tribunal rules do not limit its ability to review the credibility of witnesses or its ability to reassess the weight to be assigned to evidence in the record. Rule 348, 1996 AACS, R 205.1348,[3] in effect at the time of these proceedings, provided, in pertinent part:

> (1) A party may request a rehearing or reconsideration of a decision by a hearing officer or referee by filing a written request for a rehearing with the tribunal and submitting a copy to the opposing party within 21 days of the entry of the opinion and judgment by the hearing officer or hearing referee. The request shall demonstrate good cause as to why a rehearing shall be held. . . .
>
> * * *
>
> (4) For purposes of this rule, "good cause" means any of the following:

[3] The current version of this rule provides that a party may timely file exceptions to a hearing referee's proposed decision that "shall demonstrate good cause as to why the decision should be modified or a rehearing held." The definition of "good cause" in subsection 4 remains unchanged. 2009 AACS, R 205.1348 (effective October 19, 2009).

(a) Error of law.

(b) Mistake of fact.

(c) Fraud.

(d) Any other reason the tribunal deems sufficient and material.

In summary, MCL 205.726 provides: "A proposed decision of a hearing officer or referee shall be considered and decided by 1 or more members of the tribunal." We hold that in fulfilling this statutory responsibility, the Tax Tribunal may make its own determinations regarding the credibility of witnesses and the weight to be assigned to evidence in the record. Consequently, we conclude that the Tax Tribunal did not err by reconsidering petitioner's appraiser's credibility and the weight to be given the evidence he provided.

Petitioner next argues that the Tax Tribunal erred by employing an incorrect valuation method and by not independently determining the value of the property. Specifically, petitioner argues that (1) the valuations on the assessment rolls were determined by the cost-less-depreciation method, (2) because the properties produced income, the tribunal was required to determine their value by the income-capitalization method, and (3) by adopting the existing assessed valuations, the tribunal did not make its own independent determination of value using the correct valuation method. We disagree.

Our constitution provides for the uniform taxation of property assessed at not in excess of 50 percent of its true cash value. Const 1963, art 9, § 3. The Legislature has defined "true cash value" as meaning "the usual selling price at the place where the property to which the term is applied is at the time of assessment, being

the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale." MCL 211.27(1); see also *Antisdale*, 420 Mich at 274-276. The Legislature has specified that tax assessors "shall also consider the advantages and disadvantages of location; quality of soil; zoning; existing use; present economic income of structures, including farm structures; present economic income of land if the land is being farmed or otherwise put to income producing use; quantity and value of standing timber; water power and privileges; and mines, minerals, quarries, or other valuable deposits known to be available in the land and their value." MCL 211.27(1). Michigan courts have considered "true cash value" as being synonymous with "fair market value." *Meadowlanes*, 437 Mich at 484 n 17; *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 389.

Other than providing a broad framework and numerous factors to be considered, the Legislature has not specified methods of valuation that assessors must employ. *Antisdale*, 420 Mich 275-276. The Legislature does, however, require that an annual assessment of property subject to taxation be made by an "assessing officer" in accordance with the constitutional and statutory strictures noted above. MCL 211.10. A taxing unit's assessing officer must also be certified as qualified by the state assessor's board. MCL 211.10c and MCL 211.10d. Further, assessing officers, in preparing annual assessments, "shall use only the official assessor's manual or any manual approved by the state tax commission, consistent with the official assessor's manual, with their latest supplements, as prepared or approved by the state tax commission as a guide in preparing assessments." MCL 211.10e. In the proceedings before the Tax Tribunal here, the parties stipu-

lated the subject properties' assessed valuation (AV), state equalized value (SEV), and taxable value (TV) for the tax years at issue "as confirmed by the Board of Review or on the assessment roll." Although the parties also stipulated that the "cost approach" to valuation "is not applicable in this case," petitioner points to nothing in the record to support its argument that the assessed valuations on the assessment roll were determined by the cost-less-depreciation method of valuation.

We also disagree with petitioner's argument that because the properties were income producing, the income-capitalization method of valuation is the only acceptable method of determining the properties' true cash value. Petitioner relies on *Southfield Western, Inc v Southfield*, 146 Mich App 585; 382 NW2d 187 (1985), and *Presque Isle Harbor Water Co v Presque Isle Twp*, 130 Mich App 182; 344 NW2d 285 (1983), for this argument. Neither case supports petitioner's broad argument. In the *Southfield Western* case, the parties did not challenge using the capitalization-of-income method of valuation, nor did the Court hold that this method must always be used to value income-producing property. *Southfield Western*, 146 Mich App at 587. In the *Presque Isle* case, the Court stated that *Northwood Apartments v Royal Oak*, 98 Mich App 721, 725; 296 NW2d 639 (1980), "held that the proper method of assessing income-producing property is the capitalization of income approach." *Presque Isle*, 130 Mich App at 192-193. In *Northwood Apartments*, however, the parties again agreed that the proper method of valuation was the income-capitalization method. *Northwood Apartments*, 98 Mich App at 725. The Court further opined that "[a]ny method for determining true cash value which is recognized as accurate and reasonably related to fair market valuation is an acceptable indicator of true cash value." *Id*.

Courts have generally recognized that the "three most common approaches to valuation are the capitalization-of-income approach, the sales-comparison or market approach, and the cost-less-depreciation approach." *Jones & Laughlin*, 193 Mich App at 353. Our Supreme Court has described these three common valuation techniques, quoting from the Michigan State Tax Commission Assessor's Manual. See *Antisdale*, 420 Mich at 276-277 n 1. "Regardless of the valuation approach employed, the final value determination must represent the usual price for which the subject property would sell." *Meadowlanes*, 437 Mich at 485. In other words, a valuation method is wrong only if it does not lead to the most accurate determination of the taxable property's true cash value or fair market value. Thus, the Tax Tribunal has a duty "to select the approach which provides the most accurate valuation under the circumstances of the individual case." *Antisdale*, 420 Mich at 277; *Jones & Laughlin*, 193 Mich App at 353.

In this case, the parties each presented expert witnesses who testified at the Tax Tribunal proceedings. Both experts presented appraisals of the subject properties using both the income-capitalization method and the sales-comparison or market approach. Petitioner's expert and his appraisals concluded that the TCV of each of the properties was less than that listed on the assessment rolls. Respondent's expert and her appraisals concluded that the TCV of each of the properties was more than that listed on the assessment rolls. The Tax Tribunal was under no obligation to accept the valuation figures or the approach to valuation advanced by either petitioner or respondent. *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 378 NW2d 590 (1985). The tribunal "may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its

determination." *Jones & Laughlin*, 193 Mich App at 356. The Tax Tribunal may correlate, reconcile, and weigh valuations derived under various approaches with the ultimate goal of considering all factors under the circumstances in determining the fair market value of the subject property. *Meadowlanes*, 437 Mich at 485-486.

Next, we disagree with petitioner's argument that the Tax Tribunal committed an error of law or adopted a wrong principle by finding that the properties' assessed valuation on the tax rolls was also the properties' true cash value. In the Tax Tribunal, a property's assessed valuation on the tax rolls carries no presumption of validity. *Consol Aluminum Corp, Inc v Richmond Twp*, 88 Mich App 229, 232; 276 NW2d 566 (1979). Further, the Tax Tribunal "cannot merely affirm the assessment as placed upon the rolls by the assessing authority." *Oldenburg v Dryden Twp*, 198 Mich App 696, 699; 499 NW2d 416 (1993). For the Tax Tribunal to accord presumptive validity to a property's assessed valuation on the tax rolls would conflict with the statutory requirement that proceedings before the tribunal are "original and independent and . . . de novo." MCL 205.735(2); *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 409. Thus, the tribunal may not automatically accept the taxing authority's assessment because "[t]he Tax Tribunal has a duty to make its own, independent determination of true cash value." *Id*. at 389. Even on the failure of a party's evidence that a property's assessed valuation is lower than that on the rolls, the burden of going forward with the evidence may shift to the opposing party. *Jones & Laughlin*, 193 Mich App at 355. But the Tax Tribunal may adopt the assessed valuation on the tax rolls as its independent finding of TCV when competent and substantial evidence supports doing so. *Antisdale*, 420 Mich at 277.

In *Consol Aluminum Corp*, this Court found that the Tax Tribunal erred for two reasons when it adopted the assessed valuation on the rolls after rejecting the petitioner's evidence. First, the respondent's only witness was not allowed "to state any independent valuation conclusions because of respondent's failure to submit written appraisals before the hearing." *Consol Aluminum Corp*, 88 Mich App at 233. Second, there was evidence before the tribunal that the assessed valuation on the tax rolls was based on " 'a fiction of federal tax law,' " rather than a determination of TCV as required by MCL 211.27. *Consol Aluminum Corp*, 88 Mich App at 233-234 (citation omitted). Thus, "there was no evidence presented at the hearing from which the Tax Tribunal could have determined the true cash value for the properties in question." *Id*. at 234. Consequently, the tribunal erred by adopting the assessed valuation on the tax rolls because it must make its own independent valuation finding, *and* there must be evidence on the record supporting the finding. *Id*. at 232-234; *Teledyne*, 145 Mich App at 758.

We conclude that the Tax Tribunal did not abdicate its responsibility to independently determine the subject properties' true cash value when it adopted the properties' assessed valuation on the tax rolls. There was competent and substantial evidence in the record supporting the tribunal's determination. In other contexts, this Court has found no clear error by the fact-finder when it determines that the value of property lies within the range of values as testified to by experts. For example, a jury award in a condemnation case " 'will be upheld . . . if it is supported by competent evidence as long as the amount is not lower than the minimum, or higher than the maximum valuation placed by the witnesses on the property sought to be condemned.' " *State Hwy Comm'r v Hessell*, 5 Mich App

559, 565; 147 NW2d 464 (1967) (citation omitted). And in the context of valuing marital assets, a trial court does not commit clear error when its valuation is "within the range of figures given by the parties' experts . . . ." *Rickel v Rickel*, 177 Mich App 647, 650; 442 NW2d 735 (1989). See, also, *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994), and *Pelton v Pelton*, 167 Mich App 22, 25-26; 421 NW2d 560 (1988). We must "accept the tribunal's factual findings as final, provided they are supported by competent, material, and substantial evidence. Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin*, 193 Mich App at 352-353 (citations omitted). Here, the properties' assessed valuations on the tax rolls were in evidence because of the parties' stipulation, and there was expert testimony and appraisals in evidence placing the properties' TCV above and below the properties' assessed valuations on the tax rolls. Because the tribunal's valuation was within the range of valuations in evidence, it was supported by competent and material evidence, and we must affirm. *Antisdale*, 420 Mich at 277.

Petitioner next argues that the tribunal committed an error of law by not reiterating a separate, concise statement of facts and conclusions of law. MCL 205.751(1) provides that "[a] decision and opinion of the tribunal . . . shall be in writing or stated in the record, and shall include a concise statement of facts and conclusions of law . . . ." Also, MCL 24.285, incorporated into tribunal proceedings through MCL 205.726, provides that "[a] final decision or order of an agency . . . shall include findings of fact and conclusions of law separated into sections captioned or entitled 'findings of fact' and 'conclusions of law', respectively." Here, the hearing referee's proposed opinion and judgment contained separate sections labeled

"findings of fact" and "conclusions of law," and the tribunal's final opinion and judgment did not. Even if the tribunal's adoption of the proposed opinion and judgment, as modified by the final order, failed to comply with MCL 205.751(1) and MCL 24.285, we conclude that the error does not warrant reversal. The purpose of these provisions is to aid appellate review. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 402. It is apparent that the lack of separately captioned sections entitled "findings of fact" and "conclusions of law" in the tribunal's final opinion and judgment has not hindered petitioner in bringing its allegations of error in this Court. Also, the lack of formal labeling in the tribunal's final opinion and judgment has not impeded this Court from reviewing and deciding petitioner's claims. Consequently, any error in form has not prejudiced petitioner, and reversal is not warranted. See *Community Assoc v Meridian Charter Twp*, 110 Mich App 807, 812; 314 NW2d 490 (1981), holding "this Court will not reverse a tribunal decision unless the party alleging the error can show prejudice."

We affirm but remand to the Tax Tribunal for correction of the apparent clerical errors set forth in footnotes 1 and 2 of this opinion. We do not retain jurisdiction.

PEOPLE v JACKSON

Docket No. 294964. Submitted February 8, 2011, at Lansing. Decided February 17, 2011, at 9:05 a.m.

Thomas L. Jackson pleaded guilty in the Livingston Circuit Court to two counts of second-degree home invasion and one count of conspiracy to commit second-degree home invasion, MCL 750.110a(3) and MCL 750.157a. At defendant's sentencing, the court, Stanley J. Latreille, J., assessed 10 points for offense variable (OV) 13, MCL 777.43 (continuing pattern of criminal behavior), and 5 points for OV 16, MCL 777.46 (property obtained, damaged, lost, or destroyed), when it scored the sentencing guidelines. Defendant was sentenced as a third-offense habitual offender to 106 months to 30 years for each conviction. Defendant appealed.

The Court of Appeals *held*:

Former MCL 777.43(1)(c), now MCL 777.43(1)(d), required that 10 points to be assessed for OV 13 if the sentencing offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property. Under MCL 777.16f, second-degree home invasion is a crime against a person. Under MCL 777.18, conspiracy is designated as a crime against public safety, but at the time of defendant's offense, MCL 777.21(4) required that the offense class, offense variable level, and prior record variable level be based on the underlying offense. Thus, the trial court was required to consider the nature of the conspiracy when scoring OV 13. Defendant's conspiracy conviction was based on the two underlying home invasions, which were crimes against a person, and the trial court correctly concluded that there was a pattern of felonious criminal activity involving at least three crimes against a person or property. Resentencing was not required because even if zero points should have been assessed for OV 16, defendant's recommended minimum sentence range under the guidelines would not have changed because of the 10 points properly assessed for OV 13.

Affirmed.

SENTENCES — OFFENSE VARIABLE 13 — CONSPIRACY.

To determine whether a conspiracy conviction may be used when scoring offense variable 13 (continuing pattern of criminal behavior) under the sentencing guidelines, the sentencing court must consider the nature of the offense underlying the conspiracy; a conspiracy to commit a crime designated under the guidelines as a crime against a person or property may be used when scoring offense variable 13 (MCL 777.18, 777.21[4], 777.43[1]).

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, *David L. Morse*, Prosecuting Attorney, and *William J. Vailliencourt, Jr.*, Assistant Prosecuting Attorney, for the people.

Smith & Brooker, P.C. (by *George B. Mullison*), for defendant.

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM. Defendant pleaded guilty to two counts of second-degree home invasion, MCL 750.110a(3), and one count of conspiracy to commit second-degree home invasion, MCL 750.157a and MCL 750.110a(3). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of 106 months to 30 years for each conviction. Defendant appeals by delayed leave granted, raising issues related to his sentencing. We affirm.

I. FACTS AND PROCEDURAL HISTORY

At the plea hearing, defendant admitted that he participated with another person in the breaking and entering of two different houses. He indicated that he was aware that his codefendants were going to go into the houses without permission with the intent to steal and that he was the "lookout" and stayed in the car. He

also indicated that items were in fact stolen from the houses. Defendant further admitted that he agreed with another person to break into the houses to steal items and that he would be the lookout. The trial court found that the plea was given understandingly, voluntarily, and accurately and accepted the plea. The court subsequently sentenced defendant as a third-offense habitual offender to concurrent sentences of 106 months to 30 years, with no days of credit, to be served "consecutive to a sentence for which you are on parole." The court denied defendant sentencing credit because of defendant's status as a parolee at the time of the offenses.

II. ANALYSIS

Defendant argues that the trial court based his minimum sentences on facts not proved to a jury beyond a reasonable doubt, in contravention of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). He also argues that the trial court improperly scored offense variables (OVs) 13 and 16 and that he is entitled to sentence credit for the time spent in jail between his arrest and sentencing.

A. THE DECISION IN *BLAKELY*

Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Accordingly, defendant's argument that the trial court violated *Blakely* in scoring the guidelines is without merit.

B. OV 13

Defendant challenges the assessment of 10 points for OV 13. The version of MCL 777.43 in existence on the

date of defendant's offense, February 25, 2005, provided for the assessment of 10 points if the "offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . . ." MCL 777.43(1)(c), as amended by 2002 PA 666.[1] Additionally, MCL 777.43(2)(a) instructs that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction."

Defendant pleaded guilty of participating in the home invasion of a residence located at 15580 Graves Road, of participating in the home invasion of a residence located at 17900 Dexter Trail, and of conspiring with another individual to commit the home invasions. Defendant does not dispute that the two second-degree home invasion convictions may be used to score OV 13 because those convictions are for crimes against persons. See MCL 777.16f. He asserts, however, that the conspiracy conviction cannot be used to score OV 13 because conspiracy is a crime against public safety under MCL 777.18, not a crime against a person or property. Defendant further asserts that, if the conspiracy offense is not counted, there are no other crimes against a person or property committed by defendant within five years of these offenses that may be combined with the two home invasion convictions in order to establish the three convictions necessary to sustain a score of 10 points under 777.43(1)(c). We review de novo this issue involving the interpretation and application of the statutory guidelines. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

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[1] MCL 777.43 was amended by 2008 PA 562, effective April 1, 2009. MCL 777.43(1)(c) is now found at MCL 777.43(1)(d), but we will use the preamendment designation to refer to the specific subdivision at issue here.

A review of the presentence investigation report reveals that defendant did not engage in any other criminal activities that were directed against persons or property within the five years preceding the present offenses. The question, therefore, is whether defendant's conspiracy offense constitutes a separate crime against a person or property for purposes of scoring OV 13. There is no published authority on the question whether a conspiracy conviction may be used to score OV 13.

Conspiracy is designated as a crime against public safety in MCL 777.18. At the time of defendant's offenses, MCL 777.21(4) provided, "If the offender is being sentenced for a violation described in [MCL 777.18], determine the offense class, offense variable level, and prior record variable level *based on the underlying offense*." MCL 777.21(4), as amended by 2000 PA 279 (emphasis added).[2] The command of MCL 777.21(4) to determine the offense variable level "based on the underlying offense" reflects the intent of the Legislature that the nature of the underlying offense (and not the fact that a conspiracy had been committed) controls when and how an offense variable is scored. Reading MCL 777.18, MCL 777.21(4), and MCL 777.43(1)(c) together as a harmonious whole, see *Cadle Co v City of Kentwood*, 285 Mich App 240, 249; 776 NW2d 145 (2009), we conclude that the command of MCL 777.21(4) is sufficiently sweeping in scope to have required the trial court to consider the nature of the conspiracy for which defendant was convicted in this case when scoring OV 13.[3] Defendant was convicted of conspiring to commit

[2] MCL 777.21 was subsequently amended by 2006 PA 655, effective January 9, 2007.

[3] We note that this Court previously held in three unpublished cases decided on the same day by the same panel that conspiracy convictions

home invasions. A home invasion is a crime against a person. Because the underlying nature of the conspiracy involved a crime against a person, the conspiracy conviction was properly used when scoring OV 13 in this case.[4]

C. OV 16

In light of our conclusion that the trial court properly scored OV 13, any error in the scoring of OV 16 was harmless. The trial court assessed 5 points for OV 16. If those 5 points are subtracted from the 15-point OV total, the remaining 10 points assigned to OV 13 are sufficient to maintain the OV level at II, MCL 777.64, and, therefore, the point reduction would not trigger a need to rescore the guidelines. An erroneous score that would not, when corrected, result in a different recommended minimum sentence range does not require resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

D. JAIL CREDIT

The trial court declined to award defendant sentence credit in light of defendant's status as a parolee. Any

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are not properly scored under OV 13 because they are classified as crimes against public safety. See *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2005 (Docket No. 253299); *People v Barker*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2005 (Docket No. 253403); *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2005 (Docket No. 253943). In addition to not being binding precedent, MCR 7.215(C)(1), we also find these cases to be of limited persuasive value because the effect of MCL 777.21(4) on the resolution of the claim that points cannot properly be assessed under OV 13 for conspiracy convictions was not raised or discussed.

[4] We note that because all three offenses involve crimes against a person, the trial court could properly have assessed 25 points for OV 13 under MCL 777.43(1)(b), as amended by 2002 PA 666. MCL 777.43(1)(b) is now MCL 777.43(1)(c).

sentence credit must be applied to the sentence that defendant was still serving while on parole. *People v Idziak*, 484 Mich 549, 552, 565-567; 773 NW2d 616 (2009); *People v Filip*, 278 Mich App 635, 640-643; 754 NW2d 660 (2008). In *Idziak*, the Court rejected arguments identical or similar to those now raised by defendant—i.e., that sentence credit is required by MCL 769.11b, and the Due Process, Equal Protection, and Double Jeopardy Clauses. *Idziak*, 484 Mich at 568-570, 572-574. Thus, this argument is without merit.[5]

Affirmed.

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[5] Two of the remaining issues raised by defendant relate to arguments he raised in support of granting his delayed application for leave to appeal and, therefore, need not be addressed on appeal. Additionally, the issue regarding ineffective assistance of counsel appears to have been raised to avoid the issue-preservation requirements with regard to defendant's challenge to the scoring of the guidelines. Thus, this issue need not be addressed on appeal.

KLINE v DEPARTMENT OF TRANSPORTATION

Docket No. 295652. Submitted February 9, 2011, at Lansing. Decided March 1, 2011, at 9:00 a.m.

Hubert E. Kline brought an action in the Court of Claims against the Michigan Department of Transportation (MDOT) after his vehicle and an MDOT vehicle collided, causing him serious injuries. Although Kline sent a detailed notice of his claim to MDOT two months after the accident, he did not file a notice in the Court of Claims until eight months after the accident. MDOT moved for summary disposition under MCR 2.116(C)(4) and (7) on the ground that Kline had not complied with MCL 600.6431, which requires a person seeking to maintain a claim against a state department to file a notice of intention in the Court of Claims within six months of the event that gave rise to the cause of action. The court, Paula J. M. Manderfield, J., denied the motion after concluding that MDOT had received timely notice of Kline's intent to file a claim and that *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), which held that actual notice and a lack of prejudice do not excuse noncompliance with the notice requirements of MCL 691.1404 (pertaining to governmental immunity cases), was not applicable to MCL 600.6431. MDOT appealed.

The Court of Appeals *held*:

MDOT was entitled to summary disposition under *McCahan v Brennan*, 291 Mich App 430 (2011), which held that substantial compliance does not satisfy the notice requirements of MCL 600.6431. A conflict must be declared under MCR 7.215(J)(2) because, had MCR 7.215(J)(1) not required the panel to follow *McCahan*, it would have held that the *Rowland* rationale did not apply to MCL 600.6431 and would have affirmed on the grounds that MDOT had timely notice and was not prejudiced.

Reversed and remanded.

Judge HOEKSTRA, concurring in part and dissenting in part, agreed with the decision to reverse but would not have invoked the conflict resolution procedure because he would have held that *McCahan* was correctly decided.

Richard J. Stolcenberg for plaintiff.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Philip L. Bladen*, Assistant Attorney General, for defendant.

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

FITZGERALD, J. Defendant, the Michigan Department of Transportation (MDOT), appeals as of right the order denying its motion for summary disposition based on governmental immunity. We reverse because MCR 7.215(J)(1) requires us to follow the holding in *McCahan v Brennan*, 291 Mich App 430; 804 NW2d 906 (2011). Pursuant to MCR 7.215(J)(2), we declare a conflict with *McCahan* and state that if we were not obligated to follow *McCahan*, we would affirm.

On August 9, 2007, plaintiff, Hubert Kline, was involved in an automobile accident in which his vehicle and an MDOT vehicle collided. Plaintiff was seriously injured, and he filed a complaint against MDOT pursuant to MCL 257.401 of the Michigan Vehicle Code and MCL 691.1405, a provision of the governmental tort liability act (GTLA). On October 5, 2007, plaintiff sent a "Statutory Notice of Claim" by certified mail to MDOT. The notice provided details regarding the date, time, and location of the accident. It stated the name of the MDOT employee who was involved and provided the MDOT vehicle's identification number. The notice explained how the accident happened and described the injuries plaintiff sustained. On April 15, 2008, a "Notice of Intention to File Claim" was filed in the Court of Claims, and on June 17, 2008, an "Amended Notice of Intention to File Claim" was filed in that court. The

amended notice provided all the information contained in the original notice sent directly to MDOT. This amended notice was signed and verified in compliance with MCL 600.6431(1). On July 28, 2009, MDOT moved for summary disposition pursuant to MCR 2.116(C)(4) and (7) on the ground that plaintiff had not complied with the statutory notice provisions as required by MCL 600.6431 of the Court of Claims Act. The Court of Claims denied defendant's motion. MDOT appeals and argues that MCL 600.6431 must be enforced as written.

We review de novo motions for summary disposition brought pursuant to MCR 2.116(C)(4) and (7). *Grimes v Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006); *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008). Questions of statutory interpretation are also reviewed de novo. *Grimes*, 475 Mich at 76.

Governmental agencies are typically immune from tort liability when the agency is engaged in a governmental function. MCL 691.1407(1). However, plaintiff's case falls into the motor vehicle exception to governmental immunity. MCL 691.1405. Because plaintiff brought a claim for personal injury pursuant to the motor vehicle exception, he was required to comply with the notice provisions set forth in MCL 600.6431. MDOT argues that plaintiff did not comply as required with the notice provisions of MCL 600.6431 and that as a result of this noncompliance MDOT is entitled to summary disposition.

MCL 600.6431 states in relevant part:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions,

> boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
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> * * *
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> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

It is undisputed that plaintiff did not file the requisite notice in the Court of Claims within six months of the happening of the event that gave rise to the cause of action. Plaintiff argues that his October 5, 2007, notice to MDOT was sufficient to satisfy the statute's requirements and, therefore, defendant was not prejudiced by the failure to timely file a notice in the Court of Claims.

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), the Michigan Supreme Court, in a case involving the notice provisions applicable to the highway exception to governmental immunity, MCL 600.1404, held that the notice provision of that statute contains no prejudice requirement and that the judiciary cannot read such a requirement into the statute. *Id*. at 219. In *McCahan*, this Court concluded in a 2-1 decision that the *Rowland* rationale is not limited to the notice provisions of MCL 691.1404. The majority stated:

> We recognize that *Rowland* dealt with a different notice requirement than does this case. There does not appear to be any published decision of either this Court or the Supreme Court that definitively determines whether the *Rowland* rationale should also be applied to the notice

requirements of MCL 600.6431. Indeed, two justices of the Supreme Court disagreed on this point in separate statements to an order denying leave to appeal in *Beasley v Michigan*, 483 Mich 1025 (2009). Then Chief Justice KELLY, in her concurring statement, rejected the defendant's argument that *Rowland* should be applied to the notice provision of MCL 600.6431(3), concluding that *Rowland* was distinguishable because it dealt with a different statutory provision. *Id.* at 1025 (KELLY, C.J., concurring). Justice CORRIGAN, on the other hand, in her dissenting statement to the order denying leave to appeal, opined that *Rowland* does apply to the notice provisions of MCL 600.6431. In particular, she noted that *Rowland* "rejected earlier caselaw that had assumed notice provisions are unconstitutional if they do not contain a prejudice requirement," as well as the fact that the notice requirement in *Rowland* "is substantively identical" to the notice provisions of MCL 600.6431. *Id.* at 1028 (CORRIGAN, J., dissenting). Justice CORRIGAN also noted that the statute clearly provides that no claim may be maintained unless the notice is filed with the Court of Claims, which did not happen. *Id.*

We conclude that Justice CORRIGAN's view represents the better interpretation of the issue. While *Rowland* did directly deal with a claim arising under the defective-highway exception to governmental immunity, we, like Justice CORRIGAN, are not persuaded that the *Rowland* rationale is somehow limited to MCL 691.1404. Indeed, one of the cases that *Rowland* reviewed and rejected, *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973), overruled by *Rowland*, 477 Mich 197, dealt with a six-month notice requirement under the Motor Vehicle Accident Claims Act, MCL 257.1118. In rejecting *Carver* and other cases, *Rowland* stated that "[i]n reading an 'actual prejudice' requirement into the statute, this Court not only usurped the Legislature's power but simultaneously made legislative amendment to make what the Legislature wanted—a notice provision with no prejudice requirement—impossible." *Rowland*, 477 Mich at 213. Ultimately, *Rowland*, 477 Mich at 219, concluded that "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Ac-

> cordingly, we conclude that it must be enforced as written." The same can be said of MCL 600.6431(3). [*McCahan*, 291 Mich App at 434-436.]

We conclude that *McCahan* was wrongly decided and that *Rowland* does not dictate the outcome in this case because it involved a different statutory provision. But for the mandate in MCL 7.215(J)(1), we would not follow *McCahan*. Rather, we would affirm the trial court's order denying summary disposition for the reasons stated in the dissenting opinion in *McCahan*, 291 Mich App at 436-438 (FITZGERALD, J., dissenting):

> The majority concludes, on the basis of *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), that plaintiff's failure to comply with the plain language of the notice requirement of MCL 600.6431(3) mandated summary disposition in favor of [defendant]. Because the case before us construes a statute other than MCL 691.1404, I respectfully dissent for the reasons stated by Chief Judge MURPHY in his dissenting opinion in *Prop & Cas Ins Co of the Hartford v Dep't of Transp*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2010 (Docket No. 285749), which I quote in relevant part and whose reasoning I adopt:
>
> "Because *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), did not construe the language in MCL 600.6431(3), and because our Supreme Court has evidently decided not to extend the holding in *Rowland* to MCL 600.6431(3), I am not prepared to disavow *May v Dep't of Natural Resources*, 140 Mich App 730; 365 NW2d 192 (1985). In *May*, this Court held that a plaintiff's claims are not barred by failure to comply with MCL 600.6431(3) unless the defendant established that it was prejudiced by the noncompliance. *May* has not been reversed or explicitly overruled.
>
> "*Rowland* interpreted MCL 691.1404(1), which differs from the statute at issue here, MCL 600.6431(3). MCL 691.1404(1) provides that compliance with the notice provision is 'a condition to any recovery for injuries sustained

> by reason of any defective highway;' however, MCL 600.6431(3) does not contain comparable 'recovery precondition' language. More importantly, our own Supreme Court does not appear to be prepared to extend the holding in *Rowland* to MCL 600.6431(3). In *Beasley v Michigan*, 483 Mich 1025; 765 NW2d 608 (2009), the Michigan Supreme Court denied an application for leave to appeal relative to an order of this Court that had denied leave to appeal, which in turn pertained to an order by the Court of Claims denying summary disposition to the state. As reflected in a concurring opinion issued by CHIEF JUSTICE KELLY in *Beasley*, the state brought the motion for summary disposition on the basis that the plaintiff, who had been injured in a motor vehicle accident involving a state-owned vehicle, failed to comply with the notice requirement of MCL 600.6431(3). Thus, while I recognize that Supreme Court orders denying leave do not have precedential value, the order does appear to signal a mindset that *Rowland* is inapplicable to MCL 600.6431(3). . . .
>
> "Until the Supreme Court decides to substantively address the impact of *Rowland* on MCL 600.6431(1), which I encourage it to do as soon as possible, I will continue to recognize and respect this Court's decision in *May*. In my opinion, it defies logic to dismiss plaintiffs' claims here, where in *Beasley* the plaintiff is being permitted to proceed in the Court of Claims with the apparent blessing of the Supreme Court."

For these reasons, and because MDOT had timely notice of the claim and demonstrated no prejudice as a result of plaintiff's failure to comply with MCL 600.6431(3),[1] we would affirm the trial court's denial of defendant's motion for summary disposition. However,

[1] As noted, the record indicates that plaintiff sent a "Statutory Notice of Claim" by certified mail to MDOT approximately two months after the accident. The notice provided details regarding the date, time, and location of the accident. It stated the name of the MDOT employee who was involved and provided the MDOT vehicle's identification number. The notice explained how the accident happened and the injuries plaintiff sustained.

we begrudgingly follow *McCahan* and hold that the trial court erred by denying defendant's motion for summary disposition.

Reversed and remanded to the Court of Claims for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

BECKERING, J., concurred.

HOEKSTRA, P.J. (*concurring in part and dissenting in part*). I concur with the result reached by the majority to reverse, but respectfully disagree with its conclusion that *McCahan v Brennan*, 291 Mich App 430; 804 NW2d 906 (2011), was wrongly decided. To the contrary, I would hold that *McCahan* was correctly decided. Consequently, I disagree with the majority's invoking of the conflict resolution procedure, MCR 7.215(J)(2).

Both here and in *McCahan*, the defendants' only argument for dismissal was that the plaintiffs in these cases failed to file with the clerk of the Court of Claims within six months of the accident a notice of intention to file a claim, as required by MCL 600.6431(3).[1] In both cases, the plaintiffs sought to excuse their failure to comply with the six-month requirement by arguing that their lack of compliance did not prejudice the defendants. In deciding this issue, the Court in *McCahan* addressed whether the Supreme Court's holding in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), that enforcement of the notice provi-

[1] MCL 600.6431(3) provides:

> In all actions [against the state] for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

sion of MCL 691.1404[2] was not contingent on a showing of prejudice, should apply to MCL 600.6431. It concluded:

> While *Rowland* did directly deal with a claim arising under the defective-highway exception to governmental immunity, we, like Justice CORRIGAN [in her statement in *Beasley v Michigan*, 483 Mich 1025, 1028 (2009)], are not persuaded that the *Rowland* rationale is somehow limited to MCL 691.1404. Indeed, one of the cases that *Rowland* reviewed and rejected, *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973), overruled by *Rowland*, 477 Mich 197, dealt with a six-month notice requirement under the Motor Vehicle Accident Claims Act, MCL 257.1118. In rejecting *Carver* and other cases, *Rowland* stated that "[i]n reading an 'actual prejudice' requirement into the statute, this Court not only usurped the Legislature's power but simultaneously made legislative amendment to make what the Legislature wanted—a notice provision with no prejudice requirement—impossible." *Rowland*, 477 Mich at 213. Ultimately, *Rowland*, 477 Mich at 219, concluded that "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written." The same can be said of MCL 600.6431(3). [*McCahan*, 291 Mich App at 435-436.]

I agree with that analysis.

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[2] MCL 691.1404(1) provides:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in [MCL 691.1404(3)] shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

DAILEY v KLOENHAMER

Docket No. 300698. Submitted March 2, 2011, at Lansing. Decided March 8, 2011, at 9:00 a.m.

Barry N. Kloenhamer moved in the Clinton Circuit Court, Family Division, for sole legal custody of the child he shared with Jill S. Dailey under a previously stipulated joint-custody arrangement that had been incorporated into their divorce judgment. Kloenhamer also moved for a change in the child's medical care following disagreements with Dailey regarding treatment for the child's chronic cough. Dailey moved for a change in parenting time and a change in the child's school. The court, Lisa Sullivan, J., granted Kloenhamer's motion for sole legal custody and denied Dailey's motions. Dailey appealed only the grant of sole legal custody.

The Court of Appeals *held*:

1. Under MCL 722.27(1)(c), the circuit court's determination that there was either a change in circumstances or a proper cause to review the custody order was not against the great weight of the evidence. The record demonstrated that the parties' disagreements had escalated and expanded to include topics whose resolution could have a significant effect on the child's well-being, such as education and medical treatment, and that the disagreements had continued since the last custody order.

2. The circuit court did not abuse its discretion by determining that granting Kloenhamer sole legal custody was in the child's best interests. Because an established custodial environment existed with both parents under MCL 722.27(1)(c), the court could not modify custody unless it found clear and convincing evidence that modification was in the child's best interests. The court properly considered each statutory best-interest factor listed in MCL 722.23 and concluded that the factors relating to the provision of medical care for the child, the parties' physical health, and the child's school record all favored Kloenhamer. Given the evidence that Kloenhamer was more cooperative about making medical decisions for the child, that Dailey's migraines affected her ability to exercise parenting time, and that Kloenhamer had enrolled the

child in enrichment classes and extracurricular activities, the court's findings with regard to these factors were supported by the record.

3. The circuit court did not err by granting Kloenhamer sole legal custody despite the fact that the parties had joint physical custody. MCL 722.26a(7) clearly provides that a court's custody order may specify joint legal custody, joint physical custody, or both joint legal and joint physical custody.

4. The court did not err by failing to fashion a remedy that involved apportioning the legal-custody authority between the parties because the Legislature did not intend this remedy to be available in joint-custody arrangements.

Affirmed.

PARENT AND CHILD — CHILD CUSTODY ACT — JOINT CUSTODY — SOLE LEGAL CUSTODY.

A court may grant joint physical custody of a child to both parties while granting sole legal custody to one party under proper circumstances (MCL 722.26a[7]).

Scott Bassett for Jill S. Dailey.

Amy H. Bailey and *Erica G. Terranova* for Barry N. Kloenhamer.

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

O'CONNELL, J. Plaintiff appeals as of right the circuit court's judgment granting sole legal custody of the parties' minor child to defendant. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant divorced in 2003. The parties have one minor child, who was born March 26, 1998. During the divorce proceedings, the parties stipulated that they would share legal custody and that the child would reside with defendant. The parties also agreed to a parenting-time schedule in which the child would split

time between the parents. The circuit court incorporated the agreed-on schedule into the divorce judgment.

For the first few years after the divorce, most of the parties' disputes revolved around parenting time. However, in recent years, the disputes have grown to include larger and more significant issues. There have been some disputes over education and religion, and considerable disputes over the proper medical diagnosis and treatment for the child's chronic cough. In particular, the parties disputed whether the child should be treated for asthma. While this dispute concerning medical treatment was ongoing, plaintiff filed a motion for primary physical custody of the child. The parties reached an agreement on that motion in 2009; the agreement resulted in an order modifying the parties' parenting time. The order also required plaintiff to schedule an appointment with an allergist to obtain a second opinion on the child's respiratory condition.

The disputes between the parties continued. Eventually, a physician at C. S. Mott Children's Hospital tested the child and determined that the child did not have asthma. The parties then disagreed about the proper health-care provider to oversee the child's medications, including the cessation of asthma medications. This disagreement culminated in December 2009, when plaintiff filed a motion to have a Mott physician supervise the child's respiratory condition. Defendant opposed the motion and asked the circuit court to allow the allergist to determine the course of treatment for the child.

In March 2010, the parties reached an agreement on the motion. The agreement provided that neither party could seek respiratory treatment or testing for the child without the express written agreement of the other party. Additionally, in the event that the child redevel-

oped a serious chronic cough, the parties were required to consult with each other and agree on an appropriate course of treatment.

Two weeks later, defendant filed a motion regarding the child's medical care because the parties could not agree whether the child should undergo an allergy skin test. Defendant also filed a motion for sole legal custody. Defendant alleged that there had been a change in circumstances since the last custody order, as evidenced by the numerous motions filed by the parties regarding medical care. Additionally, defendant asserted that the parties were unable to agree on the child's education, including which school he should attend and which electives he should be taking.

In response, plaintiff indicated that defendant had failed to engage in good-faith discussions concerning medical care. Plaintiff denied that the parties were unable to agree on education, but did indicate that she was planning to file a motion for a change in parenting time so the child could attend a private school in the Detroit area where plaintiff now lived. Plaintiff subsequently filed a motion for a change in parenting time and a change in the child's school because she alleged that the child was not being adequately challenged in his current school in DeWitt. According to plaintiff, the school offered no advanced or gifted programs for the child, and the child was becoming bored with school. Defendant opposed the school change.

In August 2010, the circuit court held a hearing on the parties' motions. After two days of testimony, the circuit court issued a ruling from the bench. The court first found that there was proper cause or a change in circumstances to review the custody order. The court then found that the child had an established custodial environment in both parties' homes. After reviewing

the statutory best-interest factors of MCL 722.23, the court granted defendant's motion for sole legal custody. The court denied plaintiff's motions.

Plaintiff now appeals the grant of legal custody to defendant. Plaintiff alleges that the circuit court erred when it determined that proper cause or a change in circumstances existed for the court to review the custody order. Additionally, plaintiff argues that defendant failed to present clear and convincing evidence that a change in custody was in the child's best interests. Also, plaintiff argues that the Child Custody Act, MCL 722.21 *et seq.*, requires that a parent who is granted physical custody must also be granted legal custody. Finally, plaintiff argues that the circuit court should have implemented a less drastic remedy by apportioning the important decision-making authority between the parties.

II. STANDARD OF REVIEW

MCL 722.28 provides that in child-custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." Our Supreme Court has explained that MCL 722.28 "distinguishes among three types of findings and assigns standards of review to each." *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). Findings of fact, such as the trial court's findings on the statutory best-interest factors, are reviewed under the "great weight of the evidence" standard. *Id.* at 878-879. Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion. *Id.* at 879. An abuse of discretion exists when the trial court's decision is "palpably and grossly violative

of fact and logic . . . ." *Id.* (citation and quotation marks omitted); see also *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533 (2006). Finally, "clear legal error" occurs when a court incorrectly chooses, interprets, or applies the law. *Fletcher*, 447 Mich at 881.

III. DISCUSSION

Before modifying or amending a custody order, the circuit court must determine whether the moving party has demonstrated either proper cause or a change of circumstances to warrant reconsideration of the custody decision. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). The movant has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists. *Vodvarka*, 259 Mich App at 509. To establish proper cause, the movant must prove "the existence of an appropriate ground for legal action to be taken by the trial court." *Id*. at 512. Further, "[t]he appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude [as] to have a significant effect on the child's well-being." *Id*. Similarly, to establish a change of circumstances, the movant must prove that "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id*. at 513.[1]

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[1] Plaintiff contends that whether a party has demonstrated proper cause or a change of circumstances is a question of law that this Court should review de novo. We disagree. "This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009).

Plaintiff argues that the circuit court erred when it determined that a change in circumstances or a proper cause existed to review the custody order. We disagree. The record demonstrates that the parties' disagreements have escalated and expanded to topics that could have a significant effect on the child's well-being. The parties disagree over the proper educational course for the child. More significantly, since the date of the last custody order, the parties have continued to disagree about the child's medical treatment. Plaintiff scheduled an appointment at Mott for a pulmonary function test without defendant's knowledge, but defendant opposed the child's going to Mott and filed a motion to prevent the test. Later, the parties were unable to agree on when and how to wean the child from his asthma medications. Additionally, defendant wished to proceed with the allergist's recommendation of a skin test for the child, but plaintiff opposed the test absent express instructions from the Mott physician. The parties' recurrent disagreements delayed the child's medical treatment; further delay could have a detrimental effect on the child's well-being. These medical delays are directly relevant to the best-interest factor set forth in MCL 722.23(c) (capacity and disposition to provide the child with medical care). Given these facts, it was not against the great weight of the evidence for the circuit court to have determined that either proper cause or a change of circumstances existed to revisit the custody decision.

Next, plaintiff argues that even if proper cause or a change in circumstances did exist, the circuit court erred when it determined that granting defendant sole legal custody was in the child's best interests. Again, we disagree. Once a party has met the initial burden of showing a change in circumstances or proper cause to revisit the custody order, the next step is for the circuit

court to determine the applicable burden of proof for the custody hearing. See MCL 722.27(1)(c). In this case, because an established custodial environment existed with both parents, the circuit court correctly determined that it could not modify custody unless it found clear and convincing evidence that modification was in the child's best interests. *Id.*

In determining the best interests of the child, the court must review the best-interest factors listed in MCL 722.23. In addition, the court must consider "the general level of cooperation and agreement between the parties when considering joint custody." *Wellman v Wellman*, 203 Mich App 277, 281; 512 NW2d 68 (1994); see also MCL 722.26a(1)(b). When ruling on a custody motion, the circuit court must expressly evaluate each best-interest factor and state its reasons for granting or denying the custody request on the record. MCL 722.26a; *Meyer v Meyer*, 153 Mich App 419, 426; 395 NW2d 65 (1986).

The record confirms that the circuit court properly considered each best-interest factor and that the parties were equal on the majority of the factors. However, the court found that factors (c), (g), and (h) all favored defendant. Factor (c) is the "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . . ." MCL 722.23(c). The circuit court correctly recognized that this factor is the crux of most of the discord between the parties. Although the record indicates that plaintiff's persistence has had some positive effect on the child's medical treatment, the record also demonstrates that plaintiff second-guesses defendant's efforts and does not trust defendant to make medical decisions. The record supports the court's determination that "[t]here isn't a productive decision-making unit for the

medical decisions for [the child] at any level . . . ." Further, the record supports the court's determination that while defendant acquiesced to plaintiff's demands and was open to plaintiff's views, plaintiff did not reciprocate defendant's collegiality. In sum, the trial court's decision regarding factor (c) was within the weight of the evidence.

Factor (g) is "[t]he mental and physical health of the parties involved." MCL 722.23(g). The court found that this factor slightly favored defendant because plaintiff was suffering from temporary ocular migraines that affected her ability to exercise her parenting time. The record supports this determination.

Factor (h) is "[t]he home, school, and community record of the child." MCL 722.23(h). The circuit court correctly noted that the parties cannot agree on educational decisions. The child is doing well in school. Plaintiff nonetheless wishes to transfer the child to a private school because plaintiff believes the current school does not challenge the child. The trial court noted that despite plaintiff's concerns, plaintiff had not enrolled the child in summer enrichment programs, nor had she met with the child's teachers to discuss her concerns. In contrast, defendant had enrolled the child in robotics classes, computer animation classes, and other extracurricular activities.

The circuit court also considered the parties' ability to cooperate and generally agree on important decisions affecting the child's welfare. See MCL 722.26a(1)(b). The court correctly determined that the parties had placed a priority on their efforts to document their actions and their disagreements, while the child's medical and educational care had been relegated to an apparently secondary concern. The court concluded that the parties "just can't—they can't operate in an

effective manner for their [child]." The record indicates that the parties' acrimony affected their ability to agree on important matters, particularly with regard to the child's medical treatment.

Plaintiff maintains that the circuit court erred by failing to address each statutory best-interest factor with regard to each motion (defendant's motion for legal custody and plaintiff's motions for a change in the child's school and a change in parenting time). We find the record sufficient to determine whether the evidence clearly preponderates against the trial court's findings. See *Fletcher*, 447 Mich at 879. Moreover, plaintiff has not appealed the circuit court's decisions on her motions for a change in parenting time or for a change in the child's school. The court's factual findings with regard to defendant's motion for legal custody are supported by the record, and we need not determine in this appeal whether the findings were sufficient for any other purpose. Furthermore, the controlling standard of review requires us to affirm the circuit court's custody decision unless the decision is palpably and grossly violative of fact and logic. *Id.*; *Shulick*, 273 Mich App at 325. In this case, the circuit court's decision was supported by fact and logic. Therefore, the court did not abuse its discretion by awarding sole legal custody to defendant.

Plaintiff's next argument is that the Child Custody Act does not allow a court to grant sole legal custody to one party when the parties share physical custody. This issue was never raised below and therefore is not properly preserved for appeal. Nonetheless, we will consider the issue because it is necessary to the proper determination of the case. *Providence Hosp v Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194-195; 412 NW2d 690 (1987).

MCL 722.26a authorizes the circuit court to award joint custody. MCL 722.26a(7) provides as follows:

> As used in this section, "joint custody" means an order of the court in which 1 or both of the following is specified:
>
> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

Although not specifically designated in the statute, the custody described in § 6a(7)(a) is commonly referred to as joint physical custody, and that described in § 6a(7)(b) is referred to as joint legal custody. Plaintiff contends that the act does not authorize separating joint physical custody from joint legal custody; however, that contention is contrary to the plain language of the statute. The statute clearly provides that a trial court's custody order may specify "1 or both"—physical custody or legal custody. MCL 722.26a(7). The "1 or both" provision specifically authorizes a court to order that the child reside alternately with each parent and to also order that only one parent has "decision-making authority as to important decisions affecting the welfare of the child." MCL 722.26a(7). Moreover, the act itself states that it "is equitable in nature and shall be liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parties involved." MCL 722.26(1). Given the plain language of the joint-custody provisions and the equitable nature of the act, we hold that the act authorizes courts in proper circumstances to grant joint physical custody to the parties while granting sole legal custody to one party.

Plaintiff's final argument is that the circuit court should have fashioned a remedy to apportion the legal-

custody authority between the parties. This issue, however, was not raised below and is unpreserved. Furthermore, even if it had been preserved for appeal, the argument would be without merit. In *Shulick*, 273 Mich App at 328-329, this Court held that the Legislature did not intend to provide for joint-custody arrangements if important decision-making authority is apportioned between the parties.

IV. CONCLUSION

Proper cause or a change in circumstances existed for the circuit court to revisit the March 9, 2009, custody order. Furthermore, the circuit court's factual findings on the best-interest factors are supported by the record, and its decision to grant defendant sole legal custody is supported by fact and logic. The circuit court did not err when it ordered that the parties would have joint physical custody while granting sole legal custody to defendant.

Affirmed.

PCS4LESS, LLC v STOCKTON

Docket No. 296870. Submitted March 2, 2011, at Lansing. Decided March 8, 2011, at 9:05 a.m.

PCS4LESS, LLC, and Wholesale Cellutions brought an action in the Washtenaw Circuit Court against Kyle Stockton, Jesse Lobb, Hilary Mason, Go Mobile, Inc., and others, alleging breach of contract, conversion, civil conspiracy, tortious interference with business relations, and violation of certain statutes as a result of defendants' alleged misappropriation of certain exclusive software from plaintiffs. Plaintiffs also sought a temporary restraining order (TRO) to prevent Lobb, Mason, and Go Mobile from using or destroying the purported trade secrets contained within the software. The court, Melinda Morris, J., granted a TRO, ordering Lobb, Mason, and Go Mobile to return any of plaintiffs' property in their possession and to not delete any computerized information taken from plaintiffs. When they did not produce the CNS software program sought by plaintiffs and claimed that they never had it, the court ordered Lobb, Mason, and Go Mobile to submit affidavits stating that Go Mobile and its employees never received, possessed, or used the CNS program and never sold a cell phone that contained the CNS program. Lobb and Mason submitted affidavits in which they stated that the information at issue was protected by their right against self-incrimination under the Fifth Amendment. Plaintiffs filed a motion to compel Lobb, Mason, and Go Mobile to comply with the court's order. The court granted plaintiffs' motion, ordering Lobb, Mason, and Go Mobile to produce the CNS program or submit proper affidavits. The court then denied a motion for reconsideration. Lobb, Mason, and Go Mobile appealed by leave granted, contending that the court's orders denied their Fifth Amendment right against compelled self-incrimination.

The Court of Appeals *held*:

1. The Fifth Amendment operates not only in criminal trials, it also protects an individual from official questioning in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate the individual in future criminal proceedings. The Fifth Amendment privilege protects an individual from

being forced to answer any question that would furnish a link in the chain of evidence needed to prosecute. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. A court should bar a claim of privilege under the Fifth Amendment only when the answer cannot possibly be incriminating.

2. It should have been clear to the trial court that possession of plaintiffs' CNS program by Lobb, Mason, or Go Mobile might lead to criminal sanctions against them. Answering the question whether they possess plaintiffs' trade secrets might force them to furnish a link in the chain of evidence needed to prosecute them.

3. Although the contents of a document may not be privileged, the act of producing the document may be privileged. The Fifth Amendment privilege may apply where a governmental subpoena compels the holder of a document to perform an act that may have testimonial aspects and an incriminating effect. Here, the act of producing the content of the CNS program would be an admission that Lobb, Mason, or Go Mobile possessed it. Under the circumstances of this case, such an admission would have testimonial value and would tend to incriminate them. The order for Lobb and Mason to either produce the program or submit affidavits that they do not possess it constituted compelled self-incrimination in violation of the Fifth Amendment privilege.

4. Organizations, such as a corporation, generally are not protected by the Fifth Amendment privilege. The custodian of an organization's records may not refuse to produce the records even if the records might incriminate the custodian personally.

5. A three-part test is used to determine whether the Fifth Amendment privilege may be used to prevent the production of an organization's documents: (1) Are the documents the records of the organization rather than those of the individual who has possession of them? (2) Does the custodian hold the records in a representative, rather than a personal, capacity? Assuming affirmative answers, in the case of a corporation, the inquiry is ended. In the case of noncorporate organizations, a third question arises: (3) Does the organization have an established institutional identity that is recognized as an entity apart from its individual members? Here, application of the test mandates the conclusion that the CNS program would be a record of Go Mobile and not of Lobb or Mason. Therefore, the Fifth Amendment does not prohibit the compelled production of the CNS program. Lobb and Mason cannot rely on the Fifth Amendment privilege to avoid producing the records of a

collective entity that are in their possession in a representative capacity, even if the records might incriminate them personally. The part of the order requiring Go Mobile to produce the required affidavit is affirmed. The part of the order requiring Lobb and Mason to produce affidavits is reversed, and the case is remanded to the trial court for the entry of an order consistent with the opinion of the Court of Appeals.

Affirmed in part, reversed in part, and remanded.

1. CONSTITUTIONAL LAW — SELF-INCRIMINATION — PRIVILEGE AGAINST SELF-INCRIMINATION.

The Fifth Amendment privilege against self-incrimination operates not only in criminal trials, but also protects an individual from official questioning in any other proceeding, civil or criminal, formal or informal, administrative or judicial, or investigatory or adjudicatory where the answers might incriminate the individual in future criminal proceedings; the privilege protects an individual from being forced to answer any question that would furnish a link in the chain of evidence needed to prosecute; to sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result; a court should bar a claim of privilege only when the individual's answer cannot possibly be incriminating (US Const, Am V).

2. CONSTITUTIONAL LAW — SELF-INCRIMINATION — PRIVILEGE AGAINST SELF-INCRIMINATION.

The Fifth Amendment privilege against self-incrimination may apply when a governmental subpoena compels the holder of a document to perform an act that may have testimonial aspects and an incriminating effect; the act of producing a document may be subject to the privilege even though the contents of the document are not privileged (US Const, Am V).

3. CONSTITUTIONAL LAW — SELF-INCRIMINATION — PRIVILEGE AGAINST SELF-INCRIMINATION.

The Fifth Amendment privilege against self-incrimination may not be asserted on behalf of another and cannot be utilized by or on behalf of any organization, such as a corporation; organizations with independent existence apart from their individual members may not assert the privilege; the custodian of an organization's records may not refuse to produce the records even if those records might incriminate the custodian personally (US Const, Am V).

Jaffe Raitt Heuer & Weiss, P.C. (by *Mark L. Kowalsky* and *Patrice S. Arend*), for Jesse Lobb, Hilary Mason, and Go Mobile, Inc.

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

O'CONNELL, J. This case arises from plaintiffs-appellees' claims that defendants-appellants misappropriated certain exclusive software from appellees. Appellants appeal by leave granted. We affirm in part and reverse in part, albeit for different reasons than those relied on by the trial court.[1]

As part of their business operations, appellees purchase Motorola cellular phones on the secondary market and then apply certain software that "unlocks" the phones for sale to vendors in the United States and other countries.[2] Appellees allege that they purchased the exclusive license for the two applicable software programs, Covenant and CNS. Appellees further allege that defendant Kyle Stockton transferred certain of their financial records and the cell phone unlocking software to appellant Jesse Lobb's computer or another computer of appellant Go Mobile, Inc. Appellees claim that the transferred information constitutes confidential and trade-secret information. Appellees brought this lawsuit seeking recovery under several theories and also requesting a temporary restraining order (TRO) to prevent appellants Go Mobile, Lobb, and Hilary Mason from using or destroying the purported trade secrets. The trial court granted the TRO and ordered appellants to return any of appellees' property

[1] *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

[2] According to appellees' complaint, the software "unlock[s] the standard subsidy lock" or "unlock[s] the carrier not supported lock."

in their possession and to not delete any computerized information taken from appellees.

Because appellants did not produce the CNS program and claimed that they never had it, the trial court ordered appellants Lobb, Mason, and Go Mobile to submit affidavits that Go Mobile and its employees never received, possessed, or used the CNS program and never sold a cell phone containing the CNS program. Lobb and Mason submitted affidavits in which they stated that the information at issue was protected by their rights against self-incrimination under the Fifth Amendment. US Const, Am V. Appellees responded by filing a motion to compel Lobb, Mason, and Go Mobile to properly comply with the trial court's order.

The trial court granted appellees' motion, ordering appellants to either produce the CNS program or submit proper affidavits. The court held that appellants failed to provide the court with sufficient information to establish the testimonial and incriminating character of the requested affidavits. Although appellants informed the court that appellees had instigated a federal criminal investigation, the court noted that appellants had not described any direct contact with federal authorities, nor had appellants informed the court of any specific law under which they might be prosecuted. The court denied appellants' motion for reconsideration. On appeal, appellants argue that the trial court's orders denied their Fifth Amendment right against compelled self-incrimination.

This Court reviews a trial court's discovery orders, such as an order to compel, for an abuse of discretion. *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 50, 55; 555 NW2d 871 (1996). An abuse of discretion occurs when the trial court chooses an out-

come falling outside a range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Constitutional questions are questions of law, which we review de novo. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997).

The first question is whether the Fifth Amendment privilege against self-incrimination is applicable in this situation.[3] The Fifth Amendment operates not only in criminal trials, it also protects an individual from official questioning in "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *People v Wyngaard*, 462 Mich 659, 671-672; 614 NW2d 143 (2000) (quotation marks and citation omitted); see also *Kastigar v United States*, 406 US 441, 444; 92 S Ct 1653; 32 L Ed 2d 212 (1972) (stating that a witness may invoke the Fifth Amendment "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory"). This protection operates against the states through the Fourteenth Amendment. US Const, Am XIV. *Malloy v Hogan*, 378 US 1, 6; 84 S Ct 1489; 12 L Ed 2d 653 (1964).

The Fifth Amendment privilege protects an individual from being forced to answer any question that would " 'furnish a link in the chain of evidence needed to prosecute . . . .' " *Malloy*, 378 US at 11, quoting *Hoffman v United States*, 341 US 479, 486; 71 S Ct 814; 95 L Ed 1118 (1951). " 'To sustain the privilege, it need only be evident from the implications of the question, in

[3] The relevant aspect of the right against self-incrimination has not been interpreted differently under the Michigan Constitution than under the United States Constitution. *People v Cheatham*, 453 Mich 1, 10; 551 NW2d 355 (1996); *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 725-726; 344 NW2d 788 (1984). Nor do appellants argue that the Michigan Constitution offers them greater protection.

the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' " *Malloy*, 378 US at 11-12, quoting Hoffman, 341 US at 486-487. A court should bar a claim of privilege under the Fifth Amendment only when the answer cannot possibly be incriminating. *Id.* at 12.

In this case, appellants are essentially being asked whether they possess what appellees allege to be appellees' trade secrets. It is true that appellants did not originally provide the trial court with any specific statutes that such possession might violate, but it should have been clear that possession of appellees' CNS program might well lead to criminal sanctions against appellants. Thus, answering the question might force appellants to furnish a link in the chain of evidence needed to prosecute.

The trial court also ordered appellants to return the CNS program to appellees, if the program is in appellants' possession. In *United States v Doe*, 465 US 605, 612; 104 S Ct 1237; 79 L Ed 2d 552 (1984), the Court stated that "[a]lthough the contents of a document may not be privileged, the act of producing the document may be." Thus, where "[a] government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect," the Fifth Amendment privilege may apply. *Id*. Here, the act of producing the content of the program would be an admission that appellants possessed it. Under the circumstances of this case, such an admission would have significant testimonial value and would tend to incriminate appellants. See *id.* at 613. Therefore, the order for Mason and Lobb to either produce the program or submit affidavits that appellants do not

possess it constitutes compelled self-incrimination in violation of the Fifth Amendment privilege.

However, organizations generally are not protected by the privilege. *United States v White*, 322 US 694, 699; 64 S Ct 1248; 88 L Ed 1542 (1944); *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 715; 344 NW2d 788 (1984), citing *White*, 322 US at 699 (providing that the Fifth Amendment privilege may not be asserted on behalf of another, and it "cannot be utilized by or on behalf of any organization, such as a corporation"). Appellants argue that this case presents an exception because forcing Go Mobile to reveal whether it possesses CNS would essentially reveal whether Lobb or Mason have possessed CNS. However, as our Supreme Court has clearly observed, the custodian of an organization's records may not refuse to produce the records even if those records might incriminate the custodian personally. *Paramount Pictures Corp*, 418 Mich at 715, citing *Wilson v United States*, 221 US 361; 31 S Ct 538; 55 L Ed 771 (1911).

Appellants cite *United States v Kordel*, 397 US 1, 8-9; 90 S Ct 763; 25 L Ed 2d 1 (1970), for the proposition that a corporation's action cannot prevail over an individual's Fifth Amendment rights. They read *Kordel* too broadly. *Kordel* holds that while an agent of a corporation may assert his or her Fifth Amendment privilege, the corporation cannot take advantage of that fact to avoid answering interrogatories addressed to the corporation. *Id.* at 7-8. The *Kordel* Court held that the corporation was obligated to appoint an agent who could answer the interrogatories without fear of self-incrimination and clearly stated that it would not permit the corporation to hide behind individuals' Fifth Amendment privileges. *Id.* at 8. Although it did not decide the point, the Court suggested that in a situation

where no agent of the corporation could answer the interrogatories without incriminating himself or herself, the appropriate remedy would be a protective order postponing discovery until any criminal action was settled. *Id.* at 8-9. However, later cases have not followed this dicta. See, e.g., *Bellis v United States*, 417 US 85; 94 S Ct 2179; 40 L Ed 2d 678 (1974); *Paramount Pictures Corp*, 418 Mich 708.

Citing *Doe*, 465 US 605, appellants also argue that small companies may have Fifth Amendment rights where the only persons who could testify on behalf of the companies or produce requested documents are the same individuals whose personal Fifth Amendment rights are at stake. In *Doe*, the Supreme Court concluded that the owner of a sole proprietorship acts in a personal rather than a representative capacity, thereby allowing the owner to assert the owner's personal Fifth Amendment privilege over his or her business documents. *Id.* at 608, 617. However, Go Mobile is a Pennsylvania corporation, and appellants do not suggest that Go Mobile has only one owner. Moreover, the *Doe* Court noted that collective entities, meaning organizations with independent existence apart from their individual members, may not assert the Fifth Amendment privilege. *Id.* at 608 n 4, citing *Bellis*, 417 US at 92.

However, appellants' position is supported to some extent by dicta from *Bellis*. Though the *Bellis* Court held that independent entities may not take advantage of the privilege, it stated that the general rule might not apply in cases involving small family partnerships. *Bellis*, 417 US at 101. The key distinction recognized in *Bellis* is whether the person possessing the organization's records holds them in a personal or a representative capacity. *Id.* If the former, the records are protected; if the latter, they are not.

In *Paramount Pictures Corp*, our Supreme Court considered the federal precedent and identified a three-part test to determine whether the Fifth Amendment privilege may be used to prevent the production of an organization's documents:

> 1. Are the documents the records of the organization rather than those of the individual who has possession of them?
>
> 2. Does the custodian hold the records in a representative, rather than a personal, capacity?
>
> Assuming affirmative answers, in the case of a corporation the inquiry is ended because of the special nature of the corporate form and the state's reservation of visitatorial powers over corporations. In the case of non-corporate organizations, however, a third question arises:
>
> 3. Does the organization have an established institutional identity which is recognized as an entity apart from its individual members? [*Paramount Pictures Corp*, 418 Mich at 720 (citations omitted).]

The Court in *Paramount Pictures Corp* also considered the reference in *Bellis* to small family partnerships and concluded that the *Bellis* language "merely was meant to restate that the papers required to be produced must not be the private and personal papers of the individuals held in a personal capacity." *Id.* at 725.

Applying the *Paramount Pictures Corp* test to the current case, we conclude that the CNS program would be a record of Go Mobile and not of the individual appellants. The program, if any of the appellants have it, would be used to further Go Mobile's business. For the same reason, it appears that if either of the individual appellants have the CNS program, they hold it in a representative, rather than a personal, capacity. Therefore, under *Paramount Pictures Corp*, the Fifth Amendment does not prohibit the compelled production

of the CNS program. The individual appellants "cannot rely upon the privilege to avoid producing the records of a collective entity which are in [their] possession in a representative capacity, even if these records might incriminate [them] personally." *Bellis*, 417 US at 88.

We affirm the part of the trial court's order that required Go Mobile to produce the required affidavit. However, with respect to Mason and Lobb, that part of the order is reversed. We remand for entry of an order comporting with these instructions. We do not retain jurisdiction.

BOERTMANN v CINCINNATI INSURANCE COMPANY

Docket No. 293835. Submitted November 3, 2010, at Detroit. Decided March 8, 2011, at 9:10 a.m.

Gale Boertmann brought an action in the Macomb Circuit Court seeking no-fault personal protection insurance benefits from Cincinnati Insurance Company for psychological injuries she suffered after seeing a vehicle collide with her son's motorcycle, causing his death. At the time of the accident, plaintiff was driving directly behind her son in a vehicle insured by defendant. The court, Peter J. Maceroni, J., initially granted defendant's motion for summary disposition but, on reconsideration, vacated that order and granted summary disposition in plaintiff's favor, ruling that her injuries arose out of the use of a motor vehicle as a motor vehicle under the no-fault act, MCL 500.3105(1). Defendant appealed.

The Court of Appeals *held*:

The trial court correctly concluded that plaintiff's injuries arose out of the use of a motor vehicle as a motor vehicle because her injuries were caused by witnessing the accident, not by the death of her son, and that she was therefore entitled to personal protection insurance benefits under the no-fault act. The fact that plaintiff was not involved in the accident does not place her injuries outside the scope of MCL 500.3105(1), nor does the fact that her injuries did not result from physical contact with a motor vehicle.

Affirmed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — MOTOR VEHICLES — USE OF MOTOR VEHICLES AS MOTOR VEHICLES.

An insured may be entitled to personal protection insurance benefits under the no-fault act for psychological injuries caused by witnessing the accident that killed the insured's child; the insured need not be involved in the accident itself or be injured by physical contact with a motor vehicle to be entitled to benefits (MCL 500.3105[1]).

Mancini, Schreuder, Kline & Conrad, P.C. (by *Ellen G. Schreuder* and *Drew Slager*), for plaintiff.

Robert P. Hurley for defendant.

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

METER, J. Defendant appeals as of right from a grant of summary disposition to plaintiff under MCR 2.116(C)(10). The undisputed evidence showed that plaintiff suffered psychological injuries from witnessing the death of her son in a motor vehicle accident. We hold that the trial court correctly concluded that plaintiff's injuries arose out of the use of a motor vehicle as a motor vehicle and that she was therefore entitled to no-fault personal insurance protection (PIP) benefits. Accordingly, we affirm.

On September 1, 2007, plaintiff was driving a motor vehicle that was insured by defendant. She was driving behind her son Chris, who was operating a motorcycle. Plaintiff saw a vehicle make a wide turn into Chris's path and saw the two vehicles collide. Plaintiff proceeded to the parking lot where Chris landed after the collision and went over to him. He was severely injured and was pronounced dead approximately 30 minutes after the collision.

After the accident, plaintiff was treated by licensed psychologists Robert Cornette and Vera Sekulov and was diagnosed as suffering from "post-traumatic stress disorder . . . and major depressive disorder, single episode, severe without psychotic features." An affidavit submitted by Drs. Cornette and Sekulov states:

> Gale's post-traumatic stress disorder is caused by her witnessing of the collision which killed her son. The traumatic incident in this case is the collision itself between Christopher's motorcycle and the car that we are

> told cut him off. Gale continues to have nightmares involving car crashes in general and regularly dreams of dead bodies she does not recognize which are maimed in crashes, bodies laying in blood, with eyes and mouth open, dead people hanging with skin off, dead babies on pavement, and other gruesome sights. Recurrent images and thoughts of the accident marked diminished interest and ability to function, restricted affect and significant cognitive impairments.
>
> Gale suffers from several physical manifestations of her post-traumatic stress disorder and depression. She suffers from insomnia related to her post-traumatic stress disorder and depression, extreme fatigue, nausea, nose bleeds, sleep loss, loss of appetite, nightmares, and severe headaches on a daily basis.

Plaintiff sought PIP benefits from defendant, which defendant refused to pay. Plaintiff thereafter brought this action to recover PIP benefits for wage loss, replacement services, and medical care and expenses.

Both parties filed motions for summary disposition under MCR 2.116(C)(10). The arguments focused on whether plaintiff's injuries[1] were injuries "arising out of the . . . use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). The trial court initially granted defendant's motion and denied plaintiff's motion. The court found instructive *Williams v Citizens Mut Ins Co of America*, 94 Mich App 762, 763-765; 290 NW2d 76 (1980) (finding an inadequate causal connection when the plaintiff incurred psychological injury following the death of her child in a motor vehicle accident that she had not observed), and *Keller v Citizens Ins Co of America*, 199 Mich App 714, 715-716; 502 NW2d 329 (1993) (finding an inadequate causal connection when the plaintiff heard the screech of a vehicle's tires before the vehicle struck the plaintiff's child). The trial court

[1] That plaintiff had injuries was not contested.

explained, "The motor vehicle certainly contributed to cause the condition which produced plaintiff's injury in this matter, but the motor vehicle, itself, did not produce plaintiff's injury."

Plaintiff moved for reconsideration. The trial court granted reconsideration, vacated its prior opinion and order, and granted summary disposition to plaintiff. The court concluded that there was no caselaw indicating that no-fault benefits were not available where a claimant witnessed a motor vehicle collision that caused her injuries. The court found that *Williams* and *Keller* were distinguishable because plaintiff witnessed the collision in the present case. The court concluded that plaintiff had demonstrated a sufficient causal connection between her injury and the motor vehicle collision.

We review de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."

We hold that the trial court correctly concluded that the undisputed evidence indicated that plaintiff's injuries arose out of the use of a motor vehicle as a motor vehicle.

MCL 500.3105(1) states: "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." "Arising out of" means that the causal connection between the injury and the use of the motor vehicle must be "more than incidental, fortuitous, or 'but for.' "

Thornton v Allstate Ins Co, 425 Mich 643, 659-660; 391 NW2d 320 (1986); see also *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578, 582, 584, 586; 751 NW2d 51 (2008) (quoting *Thornton*).[2] The statutory language does not require "direct or proximate causation." *Id*. at 586. However, the fact that a vehicle is the situs of an injury is not sufficient to establish the requisite causal connection. See, e.g., *Bourne v Farmers Ins Exch*, 449 Mich 193, 200; 534 NW2d 491 (1995). The determination whether an injury may be characterized as arising out of the use of a motor vehicle as a motor vehicle depends on the unique facts of each case and must be made on a case-by-case basis. *Kochoian v Allstate Ins Co*, 168 Mich App 1, 8-9; 423 NW2d 913 (1988).

In this case, the trial court correctly recognized that plaintiff's viewing of the collision was a critical distinction between this case and *Williams*, 94 Mich App 762. In *Williams*, the plaintiff's daughter suffered fatal injuries in a motor vehicle accident. *Id*. at 763. The plaintiff thereafter received psychiatric care. *Id*. at 764. The plaintiff did not see the accident or view her daughter's body within minutes of its occurrence. *Id*. This Court concluded that the plaintiff was not entitled to no-fault benefits, reasoning that the plaintiff's injury "did not arise out of the 'ownership, operation, maintenance or use of a motor vehicle'. Rather, her injury arose out of the death of her daughter which in turn arose out of the operation of a motor vehicle." *Id*. This Court stated that it took into consideration that the plaintiff did not have an available analogous tort recovery. *Id*. at 765. The Court explained that in Michigan,

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[2] The Supreme Court initially vacated part of this Court's *Scott* decision. *Scott v State Farm Mut Auto Ins Co*, 482 Mich 1074 (2008). On reconsideration, however, the Court vacated its prior order. *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032 (2009).

> a plaintiff may recover for mental disturbance resulting in physical harm when an immediate family member is injured or exposed to injury by a negligent tortfeasor if the plaintiff is present at the time of the accident or peril or the shock is fairly contemporaneous with it. The plaintiff, however, cannot recover when he is informed of the matter at a later date. [*Id*.]

The Court expressly declined to reach "the issue of whether plaintiff would have a right to recovery under the no-fault act had she witnessed the accident or became [sic] aware of it at a time fairly contemporaneous with it." *Id*.

The facts in *Keller*, 199 Mich App 714, are more similar to the present case than are the facts in *Williams*. Plaintiff Margaret Keller was in her home when she heard the screech of tires and immediately went outside. *Id*. at 715. She saw her son's body lying in the street where he had been struck by an automobile. *Id*. Her no-fault insurer denied first-party PIP benefits for her psychiatric treatment. *Id*. This Court followed *Williams*, reasoning:

> We decline to distinguish *Williams* as plaintiffs urge us to do, and find that decision dispositive here. Margaret Keller was not injured by the automobile that struck her son. Instead, Keller's mental distress was the result of her son's tragic death, wholly independent of the cause of that death. Her injury would have been the same had the boy's death arisen from an attacking dog or from a stray bullet, for example. Because the injury suffered by Keller had only a "but for," incidental, and fortuitous connection with the use of an automobile, it was outside the scope of coverage intended by MCL 500.3105; MSA 24.13105. Accordingly, we find no error in the decision of the trial court. [*Keller*, 199 Mich App at 716.]

We conclude that evidence from plaintiff's psychologists distinguishes this case from *Keller*. This Court

stated in *Keller* that the plaintiff's injury was the result of her son's death. *Id*. In contrast, according to plaintiff's psychologists, plaintiff's injuries were the result of her having witnessed the fatal collision.[3] The psychologists' affidavit states that "Gale's post-traumatic stress disorder is caused by her witnessing of the collision which killed her son. The traumatic incident in this case is the collision itself between Christopher's motorcycle and the car that we are told cut him off." The affidavit indicates that "[r]ecurrent images and thoughts of the accident marked diminished interest and ability to function, restricted affect and significant cognitive impairments." Accordingly, it is evident that plaintiff's depression, too, is inextricably tied to the witnessing of the accident and to the posttraumatic stress disorder. Defendant did not present any evidence to counter the psychologists' affidavit.

The distinction between the grief suffered upon a loved one's death and the distress upon viewing a traumatic event that causes death is discussed in *Wolfe v State Farm Ins Co*, 224 NJ Super 348, 352; 540 A2d 871 (1988):

> When confronted with accidental death, the reaction to be expected of normal persons . . . is shock and fright. It is the sensory perception of a shocking event which causes a separate, compensable injury. . . . [I]t is the plaintiff's perception which causes the perceiver to suffer a traumatic sense of loss. Such emotional distress is not the equivalent of grief from losing a loved one, but is inflicted by the trauma of seeing a loved one suffer or die or of seeing efforts to revive [the loved one] being unsuccessful. [Citations and quotation marks omitted.]

We find this distinction pertinent in the present case.

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[3] We note that defendant does not contend that plaintiff's injuries were not "bodily injur[ies]" within the meaning of MCL 500.3105(1).

Defendant contends that, at a minimum, a claimant must be "actually involved" in an accident to recover no-fault benefits. Defendant does not clearly provide suggested parameters for the phrase "actually involved." To the extent defendant is contending that the injuries must arise from the claimant's *own* operation, use, ownership, or maintenance of a motor vehicle, caselaw does not support the argument. For example, a pedestrian may recover for injuries caused by lye that splashed up when a motor vehicle drove through a puddle. See *Jones v Tronex Chem Corp*, 129 Mich App 188, 191-193; 341 NW2d 469 (1983). Similarly, a passerby may recover for injuries caused by steam released when another person who was maintaining his vehicle opened a cap on the radiator. See *McMullen v Motors Ins Corp*, 203 Mich App 102, 103, 105; 512 NW2d 38 (1993). The Court in *McMullen* stated, "[N]othing in the language of the no-fault act requires that the injured person be the individual actually maintaining the vehicle in question." *Id*. at 107. These claimants' injuries entitled them to no-fault benefits even though the injuries did not result from their own operation, use, ownership, or maintenance of a motor vehicle. Similarly, plaintiff's injuries need not result from her own use of a motor vehicle to fall within the scope of MCL 500.3105(1).

To the extent that defendant is claiming that there must be physical contact between the claimant and the motor vehicle, caselaw also does not support the argument. Indeed, the plaintiff in *Musall v Golcheff*, 174 Mich App 700; 436 NW2d 451 (1989), was not injured by physical contact with the motor vehicle. He inserted coins in a machine to begin washing his vehicle. *Id*. at 701. The wash wand came loose from its holder and struck him. *Id*. This Court stated:

> We reject defendant's contention that since plaintiff's injury arose from contact with the wash wand, as opposed to contact with his truck, plaintiff's injury does not fall within the maintenance provision of the no-fault act. Defendant cites no authority for the proposition that injuries necessarily have to be received directly from the motor vehicle. A review of the case law does not support this narrow interpretation of the statute. [*Id*. at 704.]

Therefore, plaintiff's injuries need not result from physical contact with a motor vehicle to fall within the scope of MCL 500.3105(1).

In light of the specific facts of this case, see *Kochoian*, 168 Mich App at 8-9, especially the undisputed evidence presented by the psychologists, we hold that the trial court correctly concluded that plaintiff's injuries arose out of the use of a motor vehicle as a motor vehicle.

Affirmed.

TELLIN v FORSYTH TOWNSHIP

Docket No. 293590. Submitted January 11, 2011, at Lansing. Decided January 25, 2011. Approved for publication March 10, 2011 at 9:00 a.m..

Minors Emily Tellin, by her next friend Lori Hinga, and Matthew Werfelman, by his next friend Andrea Detamble, brought an action against Forsyth Township and West Branch Township for injuries they suffered when a steel I-beam that had been installed to support a roof overhang fell. The roof overhang was attached to the K. I. Sawyer Learning Center, which West Branch Township leased from Forsyth Township and operated in part as a library. The library was closed when the incident occurred, but a library drop box located under the overhang was open 24 hours a day. Defendants moved for summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity from tort liability under MCL 691.1407(1). The trial court, Thomas L. Solka, J., denied the motion, ruling that defendants had failed to repair or maintain a public building that was under their control and open for public use as required by MCL 691.1406, the public-building exception to governmental immunity. Defendants appealed.

The Court of Appeals *held*:

The trial court properly denied defendants' motion for summary disposition. The placement of the steel I-beam configuration constituted a failure to repair or maintain the building rather than a design defect because it was a preventive measure to supplement and coincide with the existing structure rather than a redesign of the roof overhang. Because the drop box was open to the public 24 hours a day, the building was open for public use for purposes of the public-building exception. Although plaintiffs were not using the drop box and a sign prohibited loitering in the area where plaintiffs were injured, plaintiffs were not loitering when the incident occurred. Finally, defendants had received actual notice from a Learning Center volunteer that the I-beam was not properly secured and might be unstable.

Affirmed.

1. GOVERNMENTAL IMMUNITY — PUBLIC-BUILDING EXCEPTION — DESIGN DEFECTS — FAILURES TO REPAIR OR MAINTAIN.

Under the public-building exception to governmental immunity from tort liability, a design defect is a dangerous condition inherent in the design itself, such as its characteristics, functioning, and purpose; in contrast, a failure to repair or maintain is caused by extrinsic circumstances, such as a malfunction, deterioration, or instability of part of the building or the improper securing, construction, or installation of a fixture that is part of the building; reparative or preventative measures may supplement the existing structure to preserve the existing design, and an action that was originally a design decision could be transformed into a failure to repair or maintain by subsequent improper installation, malfunction, deterioration, or instability (MCL 691.1406, 691.1407[1]).

2. GOVERNMENTAL IMMUNITY — PUBLIC-BUILDING EXCEPTION — BUILDING OPEN TO THE PUBLIC.

A building is open to the public for purposes of the public-building exception to governmental immunity from tort liability if any part of it remains open to the public; in determining whether a building is open to the public, the focus is on the intended use of the building and not merely on the hours of operation (MCL 691.1406, 691.1407[1]).

Weisse, Rettig, Rademacher, Clark & Bray, P.C. (by *Richard C. Clark*), for plaintiffs.

Bensinger, Cotant & Menkes, P.C. (by *Glenn W. Smith*), for defendants.

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

I. OVERVIEW

In July 2006, plaintiffs Emily Tellin and Matthew Werfelman were visiting the K. I. Sawyer Learning Center, located in Forsyth Township, Michigan. Plaintiffs were injured when an I-beam was dislodged and fell on them. Plaintiffs sued, and defendants Forsyth Township

and West Branch Township (the Townships) moved for summary disposition under MCR 2.116(C)(7), asserting that they were immune from suit pursuant to the governmental immunity doctrine.[1] The trial court denied the motion, ruling that the Townships were not entitled to immunity because plaintiffs demonstrated the existence of a failure to repair or maintain under the public-building exception to the governmental immunity doctrine.[2] The Townships appeal as of right the trial court's denial of their motion for summary disposition. We affirm.

II. FACTS

Before the incident at issue, the Learning Center building had existed for approximately 40 years as part of the former K. I. Sawyer Air Force Base before the federal government deeded it to defendant Forsyth Township. At some point, Forsyth Township leased the building to West Branch Township. In 2002, West Branch Township moved library books into the Learning Center. Sometime between 2002 and 2005, the Learning Center was structurally modified from a four-unit living area to its current one-unit form. Apparently, each unit previously had independent entryways. During the remodeling, the entryways were reconfigured from four separate entrances to a single, main entrance. The Townships opened the Learning Center to the public sometime in 2004.

Before 2003, a roof overhang above the main entrance of the Learning Center had been supported by wooden columns. However, in 2003, Wes Miller, the husband of the Learning Center's then current director,

[1] MCL 691.1407(1).

[2] MCL 691.1406.

brought a steel I-beam configuration to the Learning Center. The configuration included a horizontal steel I-beam with a vertical steel post welded at each end of the I-beam. Apparently, Miller delivered this I-beam configuration with the supporting steel columns already welded to the I-beam. According to Susan McNeil, one of the librarians, Miller said that the I-beam configuration would supplement the existing beam-and-column configuration of the roof overhang in case the snow load on the overhang became too heavy. However, there is no indication that the director, the governing board, or any other authority found extra support necessary or authorized the installation of the I-beam configuration. Rather, Miller, or someone from the Learning Center's staff, asked local Navy Seabee volunteers to help install the I-beam configuration under the awning within the roof overhang's existing beam-and-column structure. The parties agree that this I-beam configuration was secured only through downward compression of the existing roof overhang—there was nothing externally or internally securing it to the building or the concrete slab on which it sat. Neither Miller, his wife, nor the Townships had any inspectors examine the installation to determine whether it was up to code or passed safety regulations.

At some point after the I-beam configuration was installed, Michael Erdmann, a volunteer who had previously performed some maintenance projects at the Learning Center, kicked the I-beam configuration or applied some force to it to determine whether it was properly secured. Thereafter, Erdmann spoke with McNeil and allegedly explained that he thought someone might be able to move the I-beam configuration or that it seemed loose. There is some discrepancy over the exact substance of Erdmann's conversation with Mc-

Neil about the stability of the I-beam configuration. Regardless, the Townships did not take any action after Erdmann allegedly voiced his concern.

On July 18, 2006, at around 8:00 p.m., 13-year-old Emily Tellin and her friend, Tiffany Grondin, left the Salvation Army building, which is a neighboring building that contained recreational activities such as basketball and various games. The two went to the Learning Center to stand under the roof overhang adjacent to the entrance of the building and wait for Tellin's mother to pick them up. Matthew Werfelman and at least two other children joined them.

Grondin started swinging or twisting around the steel pole portion of the I-beam configuration. Grondin described the I-beam configuration as "wobbly" as she swung. She then leaned up against it after she became dizzy, approximately 20 seconds later. The I-beam configuration then started to dislodge and fall toward the Learning Center, sliding from underneath the overhang. As the I-beam fell, the force of the I-beam pushed Tellin to the ground. Allegedly, Tellin broke her hand from attempting to catch the I-beam configuration as it fell. Werfelman fractured his arm when the I-beam fell on him.

At the time of this incident, the interior of the library was closed for the day. However, the parties do not dispute that the Learning Center had a 24-hour book drop box, which was still open to receive book returns, located under the roof overhang area where the I-beam configuration stood. In the window under the Learning Center's roof overhang awning were two signs: one read "No Loitering" and the other instructed the public to deposit their books in the drop box under the roof overhang. McNeil testified that the "No Loitering" sign had been placed in the

window to address an ongoing vandalism problem. The sign indicating that books were to be deposited in the drop box also contained a notice that the library was moving to a different location. In its recitation of the facts, the trial court stated that the library was closed because of the move and that the moving process had already begun when this incident occurred. However, McNeil testified that the decision to move occurred after the incident and was based partly on the incident, and partly on the ongoing problems that the library had with vandalism.

Plaintiffs, through their next friends, sued the Townships, alleging that the Townships were liable under the public-building exception to the governmental immunity doctrine on the basis of their failure to repair and maintain the Library Center. Plaintiffs alleged that "[t]he overhang and beam were defective and dangerous because the vertical beam structure was not anchored to the horizontal portion of the overhand [sic] nor the surface of the base." Plaintiffs further alleged that "[a] reasonable maintenance and inspection schedule would have resulted in the discovery of the structure's instability and need for repair."

The trial court found that the Learning Center was a public building and that the steel I-beam configuration was part of that public building. Additionally, the trial court found that the Learning Center was open to the public, despite the fact that the incident occurred after hours, because of the location of the 24-hour book depository under the roof overhang. With regard to whether this was a design defect, the trial court held as follows:

> I do find the inspection by the volunteer, then relating the results of that inspection to the paid librarian, rises to the level of maintenance of that part of the public

> building that was open to the public and not design. The fact that it may have been a defective design, if there is later maintenance of that defective design or inspection, the fact that it was also defectively designed, in this Court's judgment, does not then eliminate liability from maintenance of a defectively designed structure by way of inspection.

Finally, the trial court concluded that the Townships were on notice when Erdmann told McNeil his concerns about the structure. Therefore, the trial court concluded that the Townships were not entitled to governmental immunity because plaintiffs demonstrated the existence of a failure to repair or maintain under the public-building exception. Accordingly, the trial court denied the Townships' motion for summary disposition. The Townships now appeal.

III. THE PUBLIC-BUILDING EXCEPTION

A. STANDARD OF REVIEW

This Court reviews de novo questions of law regarding governmental immunity.[3] This Court also reviews de novo motions for summary disposition under MCR 2.116(C)(7).[4] To survive a (C)(7) motion based on governmental immunity, a "plaintiff must allege facts justifying the application of an exception to governmental immunity."[5] In reviewing a (C)(7) motion, a court must accept all well-pleaded allegations as true and construe them in favor of the nonmoving party.[6] Also, this Court reviews de novo questions of statutory construction.[7]

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[3] *Pierce v Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005).

[4] *Id.*

[5] *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

[6] *Pierce*, 265 Mich App at 176-177.

[7] *Grimes v Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006).

B. GOVERNMENTAL IMMUNITY STANDARDS

Absent an exception, a governmental agency such as a township[8] is generally immune from tort liability when it is engaged in the discharge of a governmental function.[9] And the operation of a government-owned library is a governmental function.[10] Courts are required to broadly construe the term "governmental function," while strictly construing exceptions to governmental immunity.[11] One of these exceptions is the public-building exception.[12] Under the public-building exception, "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public."[13] A plaintiff must prove all of the following to bring suit against the governmental agency:

> (1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable amount of time.[14]

The parties do not dispute that the Learning Center was run by a governmental agency or that the building

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[8] See MCL 691.1401(a), (b), and (d) (defining governmental agencies to include political subdivisions, which include municipal corporations, which include townships).

[9] MCL 691.1407(1); *Stringwell v Ann Arbor Pub Sch Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004).

[10] See *Fane*, 465 Mich at 74-75.

[11] *Kerbersky v Northern Mich Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998).

[12] MCL 691.1406; *Kerbersky*, 458 Mich at 529.

[13] MCL 691.1406.

[14] *Renny v Dep't of Transp*, 478 Mich 490, 496; 734 NW2d 518 (2007); see MCL 691.1406.

itself was a public building. The parties further agree that the I-beam configuration was part of the building because it was physically connected to the building.[15] However, as we will discuss, the parties dispute whether the building was open for use by members of the public, whether the I-beam configuration was a defective condition as courts have interpreted that term, and whether the Townships had actual or constructive knowledge of the alleged defect.

C. DEFECTIVE DESIGN OR FAILURE TO MAINTAIN

The Townships argue that as governmental agencies they are immune from claims of design defects in their public buildings, which includes alleged defects in redesigns. According to the Townships, the placement of the steel I-beam configuration was simply a redesign decision that altered the initial conception of the building. And the Townships point out that the structure was in place, without issue, for three years before this incident.

The public-building exception excludes claims of design defects.[16] Therefore, to avoid governmental immunity, a plaintiff must assert a claim that the defective condition was the result of a failure to repair or maintain.[17] Accordingly, the salient question is whether plaintiffs' injuries from placement of the I-beam configuration were the result of a design defect, or a failure to repair or maintain.

A court must give effect to the Legislature's intent when construing a statute.[18] In determining the Legis-

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[15] See *Fane*, 465 Mich at 78; see also *Horace v City of Pontiac*, 456 Mich 744, 756 n 9; 575 NW2d 762 (1998) (noting that the public-building exception can apply to structures that are part of the building itself).

[16] *Renny*, 478 Mich at 505.

[17] *Id.* at 506-507.

[18] *People v Libbett*, 251 Mich App 353, 365-366; 650 NW2d 407 (2002).

lature's intent, this Court first looks at the language of the statute itself.[19] This Court gives the words of the statutes their plain and ordinary meaning and will look outside the statutory language only if it is ambiguous.[20] "The Legislature is presumed to be familiar with the rules of statutory construction and, when promulgating new laws, to be aware of the consequences of its use or omission of statutory language . . . ."[21] In determining the plain meaning of the statute, this Court uses the "fair and natural import of the terms employed" and gives effect "to every word, phrase, and clause" as far as possible.[22]

As stated, the public-building exception only applies to claims of failure to repair or maintain a public building, not to design defects.[23] In *Renny v Dep't of Transp*, the plaintiff was injured when she slipped and fell on a patch of ice and snow on the sidewalk of a rest area that defendant Michigan Department of Transportation (MDOT) operated.[24] The plaintiff brought suit against MDOT, claiming that MDOT's "failure to install and maintain gutters and downspouts around the roof of the building" caused melted snow and ice to accumulate on the entryway.[25] Originally, the rest stop had a "gutter" system that was integrated into the roof of the rest stop.[26] The design was explained as follows:

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[19] *Id.* at 365.

[20] *Id.* at 365-366.

[21] *In re MKK*, 286 Mich App 546, 556-557; 781 NW2d 132 (2009).

[22] *Libbett*, 251 Mich App at 366 (citations and quotation marks omitted).

[23] *Renny*, 478 Mich at 506-507.

[24] *Id.* at 493.

[25] *Id.* at 494.

[26] *Renny v Dep't of Transp* (*After Remand*), unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 285039) (*Renny II*), p 1.

> In contrast to a system using the more usual freestanding gutter attached to the edge of the roof, the "gutter" portion of the rest stop as it was initially designed in 1975 was part of the roof itself, the slope of which had been upturned by the use of an "outrigger" to form what appears to be a normal roof with a channel in the end of it, which drained into integral "downspouts."[27]

Sometime before the plaintiff was injured, the roof structure had been deconstructed to remove the gutters and downspouts because of a supposed malfunction of the gutter system.[28]

In holding that the public-building exception does not permit claims of design defects in public buildings, the Michigan Supreme Court explained the distinction between design defects and a failure to repair or maintain as follows:

> The first sentence of MCL 691.1406 states that "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." This sentence unequivocally establishes the duty of a governmental agency to "repair and maintain" public buildings. Neither the term "repair" nor the term "maintain," which we construe according to their common usage, encompasses a duty to design or redesign the public building in a particular manner. "Design" is defined as "to conceive; invent; contrive." By contrast, "repair" means "to restore to sound condition after damage or injury." *Similarly, "maintain" means "to keep up" or "to preserve."* Central to the definitions of "repair" and "maintain" is the notion of restoring or returning something, in this case a public building, to a prior state or condition. *"Design" refers to the initial conception of the building, rather than its restoration.* "Design" and "repair and maintain," then, are unmistakably disparate concepts, and the Legislature's sole use of

[27] *Id.* at 1-2.

[28] *Id.* at 2.

> "repair and maintain" unambiguously indicates that it did not intend to include design defect claims within the scope of the public building exception.[29]

Although it announced this distinction between "design" and "repair and maintenance," the *Renny* Court did not explain where the line between the two concepts should be drawn. Instead, the Supreme Court remanded for the Court of Claims to determine whether the plaintiff had a claim for failure to repair and maintain the building.[30]

On appeal from the Court of Claims' decision, this Court appeared to recognize that despite some of the language used in the Supreme Court's opinion, a public building could be "redesigned."[31] This Court then concluded that MDOT's removal of the gutter system was a redesign because it was an alteration of the roof structure itself and not simply a removal of the gutters.[32] In holding that this alteration was a redesign, this Court stated:

> [T]he type and extent of the change that occurred to the roof fell outside even an expansive definition of repair or maintenance, given that a portion of the roof was essen-

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[29] *Renny*, 478 Mich at 500-501 (emphasis added).

[30] *Id.* at 507. *Renny* does not make abundantly clear whether "repair"—a restorative concept—and "maintain"—a preservative concept—are two separate concepts or rather are synonyms that refer to the "notion of restoring or returning something . . . to a prior state or condition." *Renny*, 478 Mich at 501. However, because "repair" and "maintain" occur within the same sentence of MCL 691.1406, they refer to distinct concepts. See *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."). Therefore, under *Renny*, a defendant may be liable for failure to repair or failure to maintain a public building.

[31] *Renny II*, unpub op at 5.

[32] *Id.*

> tially deconstructed in order to remove the outriggers and integrated downspouts. This is not . . . a case where a simple gutter was either removed, or fell down and was not replaced.[33]

"Admittedly," this Court observed, "a situation could arise where it would be difficult to distinguish between an act of repair or maintenance of an old design and a 'redesign' that would cause a defect in the new structure to fall into the category of a design defect."[34]

One additional unpublished, post-*Renny* case recognized that redesigns are exempt from the public-building exception.[35] However, it also failed to address exactly what constitutes a redesign.[36] In *Collins v Oakland Co Community College*, the plaintiff was injured when she was sliding her chair across the defendant's dental lab, which was open to the public. Her chair hit a floor-mounted electrical plate that protruded from the lab floor.[37] This electrical socket was not part

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[33] *Id.*

[34] *Id.*

[35] *Collins v Oakland Co Community College*, unpublished opinion per curiam of the Court of Appeals, issued March 26, 2009 (Docket No. 282351).

[36] *Id.* at 2-3. A majority of the unpublished, post-*Renny* cases involved initial designs. See, e.g., *Hetherington v Univ of Mich Regents*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2009 (Docket No. 283543) (holding that the height of steps and risers and lack of accompanying guardrails were design defects); *Martin v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2008 (Docket No. 275893) (finding a design defect in absence of gutter on roof that caused ice to accumulate on sidewalk). But see *Mack v Troy City Sch Bd of Ed*, unpublished opinion per curiam of the Court of Appeals, issued August 14, 2008 (Docket No. 278406) (explaining that auditorium's burnt-out or dim aisle lights could be a failure to repair or maintain); *Joseph v Southfield Pub Sch*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 2008 (Docket No. 275869) (holding that an initial installation or construction of a drinking fountain did not constitute a design defect).

[37] *Collins*, unpub op at 1.

of the original blueprints but apparently was part of a subsequent modification.[38] Without elaboration on why this constituted a redesign, this Court concluded:

> Plaintiff argues that "[o]ne cannot characterize a feature of a building as a 'design' issue when it was not present when the building was first constructed." However, plaintiff offers no authority for this proposition. . . . Nonetheless, we note that our Supreme Court in *Renny*, rejected the notion advanced by plaintiff. The *Renny* Court stated that "[n]either the term 'repair' nor the term 'maintain,' . . . encompasses a duty to design *or redesign the public building in a particular manner.*" (Emphasis added.) Thus, the fact that the electrical socket here at issue was not part of this building's original design does not mean that plaintiff's complaint about the location of this properly functioning electrical socket is the result of defendant's failure to properly repair or maintain this building.[39]

A design defect would appear to consist of a dangerous condition inherent in the design itself, such as its characteristics, functioning, and purpose.[40] For example, the accumulation of the snow and ice on the sidewalk in *Renny* was not from any malfunction of the roof or problem with its construction, but was a natural effect of the characteristics of the new roof design, which was not intended to divert melting snow and ice.[41]

In contrast, a failure to repair or maintain appears to consist of something caused by extrinsic circumstances, such as a malfunction, deterioration, instability, or a fixture that is improperly secured or otherwise improp-

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[38] *Id.* at 1-2.

[39] *Id.* at 3.

[40] See *Renny*, 478 Mich 501 (" 'Design' refers to the initial conception of the building . . . ."); see also *Renny II*, unpub op at 5.

[41] *Renny II*, unpub op at 5.

erly constructed or installed.[42] Reparative or preventative measures may also supplement the existing structure to preserve the existing design.[43] An action could initially be a design decision, but subsequent improper installation, malfunction, deterioration, or instability could later transform this decision into a failure to repair or maintain.[44] For example, if the wiring for the electrical socket in *Collins* became compromised and began electrocuting people through normal use, then a failure to correct the problem would be a failure to repair or maintain. But tripping over the surface because of its placement is the characteristic of the design itself, and the placement would properly be a design decision.

In this case, plaintiffs were not injured because of an inherent characteristic of the I-beam configuration when coupled with the roof overhang, such as its displacement of melting snow or ice,[45] or the fact that its base protruded into the walkway causing patrons to trip.[46] Thus, this case is distinguishable from *Renny* because the initial conception of the building's structure did not change as it did in that case; rather, the Townships introduced additional support to "keep up"

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[42] See *Renny*, 478 Mich at 500-501; see also *Nowak Estate v Bay Co*, unpublished opinion per curiam of the Court of Appeals, issued July 17, 2008 (Docket No. 279076) (finding a failure to repair or maintain because of deterioration and cracking of concrete steps that caused the plaintiff to trip); *Joseph v Southfield Pub Schs*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 2008 (Docket No. 275869), p 4 (noting that the initial installation or construction of a drinking fountain was not alleged to, and did not, constitute a design defect).

[43] See *Renny*, 478 Mich at 500-501.

[44] See *id.* at 501 (stating that a " 'dangerous or defective condition of a public building' arises out of the governmental agency's failure to repair and maintain that building").

[45] See *Renny II*, unpub op at 5.

[46] See *Collins*, unpub op at 3.

and "preserve" the existing roof overhang structure. In *Renny*, the roof was deconstructed to accommodate the removal of the gutter system.[47] Unlike the roof in *Renny*, the actual structure of the roof overhang in this case was never altered or modified, and even after the I-beam configuration collapsed, the existing roof overhang remained fully functional and intact. Therefore, the installation of the I-beam configuration was a preventive measure to supplement and coincide with the existing structure rather than a redesign of the roof overhang. Any defective condition was not from the I-beam's inherent characteristics but from the Townships' failure to properly maintain the stability of this I-beam configuration.

Apart from the initial placement of the I-beam configuration, once it was installed, the Townships had a continuing duty to repair and maintain it if it became loose, damaged, or unstable.[48] This case is thus further distinguishable from *Renny* because the only way to remedy the situation in *Renny* was to install a new gutter system.[49] In contrast, the Townships could have remedied the condition at issue here had they performed regular maintenance to test the stability of the I-beam structure, which would likely have disclosed any instability. This failure to repair or maintain is further illustrated by the fact that the Townships had knowledge that this I-beam configuration was not secured. Therefore, we conclude that the trial court did not err when it characterized plaintiffs' injuries as resulting from a failure to repair or maintain the building.

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[47] *Renny II*, unpub op at 5.

[48] *Renny*, 478 Mich op at 501.

[49] See *Renny II*, unpub op at 5.

D. OPEN FOR USE BY THE PUBLIC

The Townships also argue that the trial court erred when it held that the Learning Center was open to the public at the time of the incident. The incident occurred around 8:00 p.m. when the Learning Center was closed to the public, and the Townships argue that merely making a drop box available for after-hours book returns does not make the building "open for use" by the public. Additionally, according to the Townships, the Learning Center limited the public's access to the drop box by posting a "No Loitering" sign outside the building.

In determining whether a public building is open for use by the public, we must consider the nature of the building, the building's use, and any limiting criteria on the public's right to access.[50] In *Kerbersky v Northern Mich Univ*, the Michigan Supreme Court held that the building at issue, which was part of a public university, was open for use by the public despite the fact that the area where the plaintiff was injured was not open to the general public.[51] The Court found it significant that the building remained open to the public during renovations.[52] However, the Court agreed with previous cases holding that if an entire building is closed while renovations are being performed, it is not considered open to

[50] *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 618; 664 NW2d 165 (2003); see also *Brown v Genesee Co Bd of Comm'rs (After Remand)*, 464 Mich 430, 435; 628 NW2d 471 (2001) ("When determining the public's access, we analyze the building itself, *not* the specific accident site within the building.") (opinion by CORRIGAN, C.J.).

[51] *Kerbersky*, 458 Mich at 527, 536; see also *Maskery*, 468 Mich at 619 n 9 ("*Kerbersky* clarifies that a building may be 'open for use by members of the public' even where a location within the building is restricted from public use."); *Brown*, 464 Mich at 436 (opinion by CORRIGAN, C.J.) (stating that the public-building exception applies even though the public may not enter "whenever and wherever they please").

[52] *Kerbersky*, 458 Mich at 536.

the public for purposes of the public-building exception.[53]

In contrast, in *Maskery v Univ of Mich Bd of Regents*, the Supreme Court concluded that a public university dormitory was not open for use by the public because it was locked 24 hours a day, and only residents or visitors that were permitted access from a resident were allowed admittance.[54] Albeit arguably in dictum, the *Maskery* Court explained:

> [T]he statutory language makes clear that the public-building exception applies *when* the building is open for use by members of the public. A building such as a courthouse that is open to the public during business hours may nonetheless be *closed* to the public at other times, such as at night or on weekends. Similarly, a university athletic facility may be open to the public during a sporting event, but closed to the public at other times. Because the statutory language limits the exception to periods *when* the building is open for use by members of the public, accidents that occur when the building is closed to the public do not fall within the confines of the exception, and the government is entitled to immunity.[55]

The Learning Center in this case is more like the university building in *Kerbersky* than the building in *Maskery* because the exterior area where the incident occurred was open to the public, even though the interior of the Learning Center itself was closed when the incident occurred.[56] As the Court explained in *Maskery*,

> The phrase "limited access" was used in *Kerbersky* to explain that where access *to part of a building* is limited,

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[53] *Id.* at 535.

[54] *Maskery*, 468 Mich at 611.

[55] *Id.* at 619.

[56] See *Kerbersky*, 458 Mich at 535-536; *Brown*, 464 Mich at 435.

> the public-building exception may still apply if the building remains open for use by members of the public. Here, the concept of limited access is used in a different sense, i.e., to describe a building in which access *to the entire building*, or the general right of entry, is restricted to persons who are qualified to enter. Where the government has created rules that render the building closed except to those who are qualified to enter, the building is not open for use by members of the public. The focus of the test is on the government's intended use of the building. Thus, the test set forth in this case should not be confused with the language in *Kerbersky* clarifying that a building may be open to the public even though access to a part of the building is limited.[57]

In keeping with *Kerbersky*, if even a part of a building remains open to the public, then the building falls within the public-building exception. The focus is on the intended use of the building and not merely on the hours of operation. In this case, at no point was the entire Learning Center continuously closed to the public. At any time of the day the public was freely permitted to access the area under the roof overhang where the I-beam configuration was located to use the drop box. Admittedly, plaintiffs were not under the roof overhang area to return books; however, unlike in *Maskery*, defendants had instituted no method of limiting the public's access to the roof overhang area. And although there was a "No Loitering" sign, which purported to limit access to the area, plaintiffs were not "loitering" as that term in commonly defined. "Loiter" means "to linger aimlessly . . . in or about a place" or "to waste time . . . ."[58] Rather, plaintiffs were under the roof overhang area with the purpose of waiting for their parents to pick them up. Accordingly, we conclude that

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[57] *Maskery*, 468 Mich at 618 n 9.

[58] *Random House Webster's College Dictionary* (1997), p 774.

plaintiffs presented sufficient evidence to show that the Learning Center was open to the public at the time of the incident.

E. NOTICE

Defendants further argue that the trial court erred when it found that they had notice of the defective condition because a volunteer's opinion is insufficient to put defendants on notice of a defect. Also, defendants contend, the notice was not constructive because this structure had remained in place without incident for three years.

This Court has held that knowledge of a condition may be satisfied by either actual or constructive knowledge.[59] The public-building exception presumes knowledge by a government agency if "such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place."[60] The main thrust of the Townships' argument is basically that they never inspected the structure and thus never had knowledge of the condition. However, the Townships received actual notice of the fact that this I-beam configuration was not properly secured when Erdmann informed McNeil that it was loose or might be able to move. There is some dispute regarding how detailed Erdmann's critique of the stability of the I-beam configuration was, yet McNeil admitted that Erdmann did warn her about its possible instability. Therefore, we conclude the trial court did not err when it concluded that the Townships had sufficient notice of the defective condition.

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[59] *Ali v Detroit*, 218 Mich App 581, 586-587; 554 NW2d 384 (1996).

[60] MCL 691.1406.

IV. CONCLUSION

The trial court did not err when it concluded that plaintiffs' injuries from the I-beam configuration arose from a failure to repair or maintain and not a design defect. The trial court also did not err by concluding that the Learning Center was open for use by the public. And the trial court did not err when it concluded that the Townships had sufficient notice of the defective condition. Accordingly, the trial court properly denied defendants' motion for summary disposition under MCR 2.116(C)(7).

We affirm.

DeFRAIN v STATE FARM MUTUAL INSURANCE COMPANY

Docket No. 294505. Submitted March 1, 2011, at Detroit. Decided March 10, 2011, at 9:05 a.m.

Nancy J. DeFrain, personal representative of the estate of William DeFrain, deceased, brought an action in the Wayne Circuit Court against State Farm Mutual Automobile Insurance Company, seeking uninsured-motorist coverage through an insurance policy with State Farm for injuries received by William when, while a pedestrian, he was struck by a hit-and-run driver. The accident occurred on May 31, 2008. William notified State Farm of the accident on August 25, 2008. On November 11, 2008, William died as a result of his injuries. State Farm brought a motion for summary disposition, alleging that it was relieved from contractual liability under the policy because of William's failure to timely comply with the provision in the policy that required an insured to report an accident involving a hit-and-run motor vehicle to State Farm within 30 days of the accident. The court, Gershwin A. Drain, J., denied the motion for summary disposition on the basis that State Farm had failed to show prejudice resulting from the failure to comply with the notice provision. State Farm appealed by leave granted.

The Court of Appeals *held*:

Because uninsured-motorist benefits are not required by statute, interpretation of the policy dictates under what circumstances the benefits will be awarded. It is a well-established principle that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position. The same actual-prejudice requirement applies to the 30-day notice provision in this case. The order denying State Farm's motion for summary disposition is affirmed.

Affirmed.

INSURANCE — UNINSURED-MOTORIST BENEFITS — ACTIONS — PREJUDICE.

An unambiguous provision in an uninsured-motorist policy must be enforced as written, regardless of the equities and reasonableness of the provision; an insurer must establish actual prejudice to its

position, however, in order to cut off its responsibility under an uninsured-motorist policy provision that requires the insured to report an accident involving a hit-and-run motor vehicle to the police within 24 hours and to the insurer within 30 days when the insured has failed to timely comply with the notice provision.

Drazin & Associates, P.L.L.C. (by *Robert S. Drazin*), for plaintiff.

Conlin, McKenney & Philbrick, P.C. (by *W. Daniel Troyka* and *Andrew D. Sugerman*), for defendant.

Before: MURPHY, C.J., and STEPHENS and M. J. KELLY, JJ.

MURPHY, C.J. Defendant, State Farm Mutual Automobile Insurance Company, appealed by leave granted the trial court's order denying its motion for summary disposition. This case arose out of a hit-and-run accident that resulted in the death of William DeFrain, who had uninsured-motorist (UIM) coverage through an insurance policy with State Farm. The dispute before us concerns Mr. DeFrain's failure to timely comply with a provision in the policy that required an insured to report an accident involving a hit-and-run motor vehicle to State Farm within 30 days. In *Koski v Allstate Ins Co*, 456 Mich 439; 572 NW2d 636 (1998), our Supreme Court held that an insurer had to establish actual prejudice before it could be relieved from contractual liability under an insurance policy, when the insured had failed to timely comply with a notice provision contained in the policy that constituted a condition precedent to insurer liability. Because we conclude that *Koski* applies here, and because we agree with the trial court that State Farm failed to establish actual prejudice as a matter of law, we affirm the trial court's order denying State Farm's motion for summary disposition.

On May 31, 2008, Mr. DeFrain was a pedestrian when he was struck by a hit-and-run driver and sustained severe head injuries. He first notified State Farm of the accident on August 25, 2008. On November 11, 2008, Mr. DeFrain died as a result of his injuries. His State Farm policy had provided for UIM benefits.[1] Pursuant to the policy, a person making a claim for UIM benefits "must report an accident, involving a 'hit-and-run' motor vehicle to the police within 24 hours and to ***us*** within 30 days . . . ." As indicated, Mr. DeFrain failed to timely comply with the 30-day notice provision.[2] The policy also had language requiring a claimant to notify State Farm of a UIM claim and to give it "all the details about the death, injury, treatment, and other information that [State Farm] may need *as soon as reasonably possible* after the injured **insured** is first examined or treated for the injury." (Emphasis in italics added.) The trial court denied State Farm's motion for summary disposition, noting the existence of an ambiguity when reading the 30-day notice provision in conjunction with the provision calling for a claimant to provide State Farm with notice of a claim and medical details as soon as reasonably possible.

We find it unnecessary to decide the issue whether the trial court erred by finding an ambiguity, because the trial court also ruled that "I don't really see any real prejudice here, so I am accordingly going to deny [State Farm's] motion for summary disposition and that's my decision." One of the arguments on appeal proffered by plaintiff in support of affirming the trial court's denial

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[1] There is no indication in the record that Mr. DeFrain had failed to pay his premiums on the policy that had provided the UIM coverage.

[2] At oral argument, plaintiff's counsel indicated, without dispute from State Farm's counsel, that Mr. DeFrain underwent brain surgery after the accident and was in intensive care throughout the 30-day notice period. This fact does not play a role in our analysis and holding.

of State Farm's motion for summary disposition is that State Farm did not show any prejudice that resulted from the failure to comply with the 30-day notice provision. We agree. Indeed, State Farm makes no argument that it suffered any prejudice as a result of the delay.

In *Jackson v State Farm Mut Auto Ins Co*, 472 Mich 942 (2005), our Supreme Court, in lieu of granting leave to appeal, vacated a judgment entered by this Court and reinstated an order of summary dismissal entered by the trial court "for the reasons stated in the Court of Appeals dissent." As revealed in this Court's opinion in *Jackson*, the injured insured failed to comply with a similar 30-day notice provision with respect to a claim for UIM benefits after being injured in a hit-and-run accident. *Jackson v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket No. 246388). The majority found the existence of an ambiguity in the policy and held that the trial court erred by granting State Farm's motion for summary disposition. *Id.* at 1. In light of its holding, the Court found it unnecessary to address the plaintiff's argument that the notice provision was enforceable only if State Farm could prove prejudice. *Id.* at 4. The dissent, however, addressed the prejudice issue and rejected the argument that prejudice had to be established. The dissent found that *Wendel v Swanberg*, 384 Mich 468; 185 NW2d 348 (1971), which was cited by the plaintiff in support of the prejudice argument, was "distinguishable on the basis that it d[id] not involve a condition precedent to the filing of an action against an insurer, but, rather, when reasonable notice of a pending lawsuit is given to the insurance carrier." *Jackson*, unpub op at 4 (GRIFFIN, J., dissenting). The dissent also stated that "the present

case d[id] not involve any statutory obligations; instead, it entail[ed] a matter of contractual interpretation." *Id.*

We initially note that "because uninsured motorist benefits are not required by statute, interpretation of the policy dictates under what circumstances those benefits will be awarded." *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993). Here, on the prejudice issue, plaintiff also cites *Wendel*, which was distinguished and rejected in the *Jackson* dissent adopted by the Supreme Court. However, plaintiff also cites *Koski*, 456 Mich 439, which concerned the interpretation and application of a homeowner's insurance policy. Under the policy, in the event of an accident or claim, the insured was required to immediately forward to Allstate any legal papers received by the insured concerning the accident or claim (the notice-of-suit provision). The Court stated, "plaintiff's duty to immediately forward any legal papers relating to a claim is a *condition precedent* to Allstate's liability under [the] policy." *Id.* at 444 (emphasis added). Thus, the two grounds cited by the dissent in *Jackson* for distinguishing *Wendel* and rejecting application of a prejudice requirement, i.e., the 30-day hit-and-run notice provision was a condition precedent to liability and the provision entailed a matter of contractual interpretation and not statutory obligations, were both present in *Koski*, i.e., the notice-of-suit provision was a condition precedent to liability and the provision entailed a matter of contractual interpretation and not statutory obligations. Therefore, *Jackson* squarely stands in direct conflict with *Koski.* The *Koski* Court ruled that "it is a well-established principle that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time *must establish actual prejudice to its position*." *Koski*, 456

Mich at 444 (emphasis added). We find that *Jackson* is of questionable and limited value because it did not address *Koski*, which apparently was not argued there, and which constitutes binding precedent that we are not free to disregard.

The 30-day notice provision here did not require notice immediately or within a reasonable time, but there is no reason why the actual-prejudice requirement from *Koski* would not apply because of that distinction. The well-established prejudice principle from *Koski* is offended and essentially discarded by not applying it in the case at bar, and *Koski* is a fully developed and reasoned opinion on the subject of prejudice in the context of insurance law, whereas the Supreme Court's order in *Jackson* is merely a cursory order. The proposition that we should give more weight to a Supreme Court opinion than to a Supreme Court order, aside from being self-evident, is reflected in how the Supreme Court itself has at times treated its own orders. For example, in *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 506; 722 NW2d 666 (2006), rev'd 480 Mich 948 (2007), this Court ruled that a prior Supreme Court opinion had to be applied retroactively where "the Michigan Supreme Court ha[d] plainly and unambiguously expressed its intent that the decision . . . applie[d] retroactively" in *three consecutive orders*. However, the Supreme Court reversed this Court's ruling, holding that its earlier opinion was not fully retroactive despite the fact that it had issued three orders commanding retroactive application, and the Court did not even bother to discuss stare decisis in ignoring and essentially overruling its prior orders. 480 Mich 948.

Finally, we note this Court's decision in *Bradley v State Farm Mut Auto Ins Co*, 290 Mich App 156; 810 NW2d 836 (2010), wherein we applied the *Koski* preju-

dice requirement when the plaintiff failed to join State Farm and the tortfeasors in a suit as required by the UIM benefits provision of the insurance policy. We held that "because defendant suffered no prejudice from the failure to join, defendant should not be relieved of liability to provide uninsured-motorist benefits to plaintiff, who had paid premiums for that coverage." *Id.* at 160. The *Bradley* panel also discussed *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005), in which the Supreme Court held that an unambiguous provision in a UIM policy must be enforced as written regardless of the equities and the provision's reasonableness. The majority opinion in *Bradley* stated that "*Koski* carved out a narrow prejudice requirement relative to all insurance contracts, and *Rory* did not overrule the Supreme Court's earlier ruling in *Koski*, which we find controlling." *Bradley*, 290 Mich App at 161. The Court, *id*. at 161 n 1, further observed:

> The dissent disagrees that defendant should be required to show prejudice, asserting that *Rory* controls . . . . *Rory*, however, did not examine the prejudice principle discussed in *Koski*. Moreover, *Tenneco* [*v Amerisure Mut Ins Co*, 281 Mich App 429, 447-448; 761 NW2d 846 (2008)], which was decided in 2008 and after *Rory* was issued, and which constitutes binding precedent, acknowledged the continuing application of *Koski*. The *Tenneco* panel also cited additional, earlier Michigan Supreme Court precedent supporting imposition of a prejudice requirement. *Id.* at 448.

In sum, we hold that, regardless of the order in *Jackson*, *Koski* demands that we affirm the trial court's order denying State Farm's motion for summary disposition.

Affirmed. Plaintiff, as the prevailing party, is awarded costs pursuant to MCR 7.219.

BIONDO v BIONDO

Docket No. 294694. Submitted January 5, 2011, at Detroit. Decided March 15, 2011, at 9:00 a.m.

James F. and Mary L. Biondo were granted a consent judgment of divorce in the Oakland Circuit Court, Cheryl A. Matthews, J. The judgment equally divided the martial estate and required them to "equalize their social security benefits." When Mary sought a court order compelling performance of the judgment's social security provision, James asserted that federal law preempted its enforcement. The court entered an order providing that it would enforce the social security provision. James appealed by leave granted.

The Court of Appeals *held*:

1. Federal law preempts state law under the Supremacy Clause, US Const, art VI, cl 2, when Congress so intends. Federal law generally does not preempt state laws governing divorce or domestic relations. State family and family-property laws must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden.

2. Section 407(a) of the Social Security Act, 42 USC 407(a), prohibits the assignment of social security benefits and removes social security benefits from the reach of attachment, garnishment, or other legal process. 42 USC 407(a) bars automatic, direct payments of social security benefits from one spouse to another and offsetting awards intended to compensate one spouse for the value of the benefit expected by the other. 42 USC 407(a) preempts the social security equalization provision in the parties' consent judgment.

3. Although federal law preempts a portion of the parties' judgment of divorce, the trial court still possessed subject-matter jurisdiction to enter the judgment.

4. The inclusion of the social security equalization provision was the result of a mutual mistake of the parties. Therefore, the trial court may modify the judgment's property-settlement provisions on remand.

5. The trial court, on remand, may consider the parties' anticipated social security benefits as one factor, among others, to be considered when devising an equitable distribution of the marital property. The trial court may not treat social security benefits as tantamount to a marital asset but may take into account, in a general sense, the extent to which social security benefits received by the parties affect the following factors for consideration when dividing marital property: (a) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life status of the parties, (6) the necessities and circumstances of the parties, (7) the earning abilities of the parties, (8) the past relations and conduct of the parties, and (9) general principles of equity.

Reversed and remanded.

1. CONSTITUTIONAL LAW — SUPREMACY CLAUSE — CONFLICT OF LAWS — DIVORCE — DOMESTIC RELATIONS.

Federal law preempts state law under the Supremacy Clause when Congress so intends; although federal law generally does not preempt state laws governing divorce or domestic relations, the Supremacy Clause will demand that state law be overridden when state family and family-property laws do major damage to clear and substantial federal interests (US Const, art VI, cl 2).

2. CONSTITUTIONAL LAW — SUPREMACY CLAUSE — CONFLICT OF LAWS — SOCIAL SECURITY — MARTIAL PROPERTY.

The Social Security Act prohibits the assignment of social security benefits and removes social security benefits from the reach of attachment, garnishment, or other legal process; the Supremacy Clause preempts state laws regarding the division of martial property only to the extent that such laws are inconsistent with the provision of the Social Security Act prohibiting the assignment, attachment, or garnishment of social security benefits (US Const, art VI, cl 2; 42 USC 407[a]).

3. DIVORCE — MARITAL PROPERTY — SOCIAL SECURITY BENEFITS.

A trial court dividing marital property may consider the following factors: (1) the duration of the marriage, (2) contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life status of the parties, (6) the necessities and circumstances of the parties, (7) the earning abilities of the parties, (8) the past relations and conduct of the parties, and (9) general principles of equity; although the court may not treat social security benefits as tantamount to a marital

> asset, the court may take into account, in a general sense, the extent to which social security benefits received by the parties affect the factors the court considers in dividing marital property (42 USC 407[a]).

Gornbein Smith Peskin-Shepherd PLLC (by *Danielle A. Smith*) for James F. Biondo.

Colleen V. Ronayne for Mary L. Biondo.

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

GLEICHER, J. James Franklin Biondo and Mary Lynne Biondo were married for more than 40 years. Their consent judgment of divorce equally divided the marital estate and required them to "equalize their social security benefits." When Mary Biondo sought a court order compelling performance of the judgment's social security provision, James Biondo asserted that federal law preempted its enforcement. The circuit court ruled that "[a] deal is a deal," and declined to strike the social security provision from the divorce judgment. We granted leave to appeal to consider whether federal law preempts the consent judgment's social security formula. We hold that it does, reverse the circuit court ruling to the contrary, and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

The parties married in 1964, and in July 2007 consented to the entry of a divorce judgment. During the marriage, James Biondo worked for Ford Motor Company, while Mary Biondo cared for the parties' two children, who are now adults. The marital property included a home in Birmingham, two vehicles, and several bank accounts. The consent judgment "reserved

for future adjudication" the issue of spousal support derived from "earned income," and forever barred spousal support based on nonearned income. A specific provision, entitled "Social Security Benefits," obligated the parties to "equalize their social security benefits." After entry of the divorce judgment, the parties stipulated to the entry of a qualified domestic relations order (QDRO), which allocated to Mary Biondo 50 percent of James Biondo's accrued retirement benefits as of the date of the divorce. The parties agree that they intended the consent judgment's property division to equally divide the marital estate.

In July 2009, Mary Biondo filed in the circuit court a motion seeking "compliance" with the judgment's "Social Security Benefits provision." Mary Biondo averred that James Biondo had failed to make timely and full social security equalization payments. James Biondo responded that the judgment's social security formula violated federal law, and that any order enforcing the social security benefits term would be invalid. After a motion hearing, the circuit court entered an order announcing in relevant part that "the Court will enforce the property settlement provision regarding Social Security Benefits contained in the July 10, 2007 consent judgment of divorce." We granted James Biondo's application for leave to appeal. *Biondo v Biondo*, unpublished order of the Court of Appeals, entered February 23, 2010 (Docket No. 294694).

II. ANALYSIS

James Biondo contends that the circuit court "lack[ed] subject matter jurisdiction to enforce the social security property provision of the parties' . . . judgment of divorce." According to James Biondo, 42 USC 407 preempts state courts from transferring any of an individual's social

security benefits "by any legal process to any . . . person other than that person whom the Federal Government intended to be the recipient of those benefits." "Whether a trial court has subject-matter jurisdiction is a question of law that this Court reviews de novo." *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 472; 628 NW2d 577 (2001). We also review de novo whether federal law preempts state law. *People v Kanaan*, 278 Mich App 594, 601; 751 NW2d 57 (2008).

"Under the Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, federal law preempts state law where Congress so intends." *Konynenbelt v Flagstar Bank, FSB*, 242 Mich App 21, 25; 617 NW2d 706 (2000). Generally, federal law does not preempt laws governing divorce or domestic relations, a legal arena belonging to the states rather than the United States. *Hisquierdo v Hisquierdo*, 439 US 572, 581; 99 S Ct 802; 59 L Ed 2d 1 (1979). Thus, "[s]tate family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden." *Id*. (quotation marks and citation omitted). Here, we consider whether the federal interest in social security benefits preempts enforcement of the parties' agreement to equalize their social security benefits.

We begin our analysis by consulting the specific federal statute at issue, § 407(a) of the Social Security Act:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. [42 USC 407(a)].

James Biondo's preemption argument rests on the language of this statute prohibiting transfer, assignment, "execution, levy, attachment, garnishment," or application of "other legal process" to a beneficiary's right to collect social security benefits. In *Hisquierdo*, 439 US 572, the United States Supreme Court construed strikingly similar language in the Railroad Retirement Act of 1974 (RRA), 45 USC 231 *et seq*.[1] The parties in *Hisquierdo* divorced in California. *Hisquierdo*, 439 US at 573. The California Supreme Court ruled that the husband's railroad retirement benefits constituted community property subject to division in the divorce judgment. *Id*. The United States Supreme Court reversed the California Supreme Court, holding that 45 USC 231m preempted California's community-property law. *Hisquierdo*, 439 US at 590. The United States Supreme Court explained that the statutory language comprising 45 USC 231m reflected congressional intent that a "specified beneficiary" would receive benefits undiminished by "attachment and anticipation." *Hisquierdo*, 439 US at 582. The statute's "critical terms" prohibiting assignment, garnishment, attachment or subjection to legal process "prevent[] the vagaries of state law from disrupting the national scheme, and guarantee[] a national uniformity that enhances the effectiveness of congressional policy." *Id*. at 582, 584.

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[1] The statutory language at issue in *Hisquierdo*, 45 USC 231m(a), directs that

> not withstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated[.]

Notably, in *Hisquierdo* the Supreme Court interpreted § 231m as not only barring automatic, direct payments of RRA benefits from one spouse to another, but as also prohibiting "offsetting award[s]" intended to compensate one spouse for the value of the benefit expected by the other. *Id*. at 588. The Supreme Court reasoned that because § 231m contemplates that payments are not to be "anticipated," an award intended to offset future payments would permit a divorcing spouse to receive a beneficial interest in retirement payments that had not yet accrued to the other spouse. *Id*. The Court further observed that a counterbalancing award of RRA benefits "would upset the statutory balance and impair [the retiree's] economic security just as surely as would a regular deduction from his benefit check." *Id*. Consequently, the Court concluded that state marital-property laws must yield to Congress's determination that RRA benefits "should go to the retired worker alone . . . ." *Id*. at 590.

Like 45 USC 231m of the RRA, 42 USC 407(a) prohibits the assignment of social security benefits and removes social security benefits from the reach of "attachment, garnishment, or other legal process . . . ." That virtually identical language appears in both statutes compels us to apply *Hisquierdo*, and to declare that § 407(a) preempts the social security equalization provision in the Biondos' consent judgment. We find additional support for our holding in *Hisquierdo* itself, where the Supreme Court specifically analogized the RRA to the Social Security Act, observing that the former RRA "was amended several times to make it conform more closely to the existing Social Security Act." *Hisquierdo*, 439 US at 574 n 3.[2]

[2] The Supreme Court in *Hisquierdo* also identified another similarity shared by the RRA and the Social Security Act: "Like Social Security, and

Furthermore, we find it significant that Congress created an exception to 42 USC 407(a) when it enacted 42 USC 659(a), which permits the states to employ social security benefits for the enforcement of child support and alimony obligations. Application of social security benefits for marital property purposes remains specifically excluded from this exception, because Congress declared in 42 USC 659(i)(3)(B)(ii) that the term "alimony" does not encompass "any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." Therefore, we conclude that the circuit court erred by enforcing the consent judgment's social security provision.

In reaching this conclusion, we specifically reject James Biondo's suggestion that the circuit court did not possess subject-matter jurisdiction to enter the terms of the parties' consent judgment of divorce. That federal law has preempted a portion of the parties' consent judgment of divorce in no manner deprives the circuit court of subject-matter jurisdiction in this divorce matter. The Social Security Act simply does not divest state courts of subject-matter jurisdiction in divorce cases. Rather, the Supremacy Clause preempts state laws regarding the division of marital property only to the extent they are inconsistent with 42 USC 407(a). The Michigan Supreme Court has explained this distinction as follows:

> The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain

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unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time." *Id*. at 575.

> legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. [*Buczkowski v Buczkowski*, 351 Mich 216, 222; 88 NW2d 416 (1958).]

Although the circuit court erred by ordering the social security equalization, it did not exceed its subject-matter jurisdiction in doing so. Const 1963, art 6, § 13; MCL 552.6(1).

Having determined that federal law preempts the social security equalization formula in the Biondos' divorce judgment, we now address the consequences of this decision.

> It is a well-settled principle of law that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged. [*Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990).]

This Court has described a mutual mistake as a situation "where the parties have a common intention," but the resulting judgment rests on a common error. *Villadsen v Villadsen*, 123 Mich App 472, 477; 333 NW2d 311 (1983) (quotation marks and citation omitted). In drafting the consent judgment, the parties incorrectly deemed their social security benefits marital property, to be equally divided along with the rest of the marital estate. Because no prior published Michigan caselaw removed social security benefits from the realm of marital property, we view the consent judgment's inclusion of the social security equalization term as a mutual

mistake. Accordingly, on remand the circuit court may modify the judgment's property-settlement provisions.

We anticipate that on remand the Biondos will contest whether the amount of the parties' anticipated social security benefits may play any part in a modified judgment reallocating marital property. We consider this important question to offer guidance to the parties and the circuit court. In *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992), our Supreme Court set forth the following relevant factors for consideration when dividing marital property: "(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity." The amount of a spouse's anticipated or received social security benefits qualifies as relevant to several of the *Sparks* factors, including the contributions each made to the marital estate, their "necessities and circumstances," and "general principles of equity." *Id*. at 160.

A number of state courts have addressed the extent to which a divorce court may consider social security benefits when formulating an equitable division of property. The Iowa Supreme Court has held that social security benefits may generally inform a property division:

> We see a crucial distinction between: (1) adjusting property division so as to indirectly allow invasion of benefits; and (2) making a general adjustment in dividing marital property on the basis that one party, far more than the other, can reasonably expect to enjoy a secure retirement. It should not invalidate a property division if a disproportionate expectation regarding social security ben-

> efits is acknowledged in the court's assessment of the equities. [*In re Marriage of Boyer*, 538 NW2d 293, 296 (Iowa, 1995).]

In *Boyer*, the Iowa Supreme Court rejected the notion that "the federal preemption legislation requires state courts under these circumstances to purge so obvious an economic reality" as disproportionate anticipated social security benefits. *Id*. Similarly, the Maine Supreme Judicial Court has reasoned:

> The court's role in property division is to accomplish a just division that takes into account "all relevant factors." Just as few married couples engaged in a serious assessment of their retirement resources would ignore the availability of Social Security benefits, courts should not be required to ignore reality and fashion a distributive award of the parties' retirement and other marital assets divorced from the actual "economic circumstances of each spouse at the time the division of property is to become effective." 19-A M.R.S. § 953(1)(C); *see also In re Marriage of Boyer*, 538 N.W.2d [at] 293-94 . . . (stating that "a state court is not required to pretend to be oblivious of the fact that one party expects benefits that will not be enjoyed by the other"). Failing to consider Social Security benefit payments a spouse can reasonably be expected to receive in the near future may result in a distorted picture of that spouse's financial needs, and, in turn, an inequitable division of the marital property. [*Depot v Depot*, 2006 ME 25, ¶ 17; 893 A2d 995 (2006).]

And the Colorado Court of Appeals has expressed: "[W]hile a trial court may not distribute marital property to offset the computed value of Social Security benefits, it may premise an unequal distribution of property—using, for example, a 60-40 formula instead of 50-50—on the fact that one party is more likely to enjoy a secure retirement." *In re Marriage of Morehouse*, 121 P3d 264, 267 (Colo App, 2005).

We join the majority of state courts that have considered this question, and hold that the circuit court may consider the parties' anticipated social security benefits as one factor, among others, to be considered when devising an equitable distribution of marital property. We caution that in endeavoring to divide the marital estate, the court may not treat social security benefits as tantamount to a marital asset. Instead, the circuit court may take into account, in a general sense, the extent to which social security benefits received by the parties affect the *Sparks* factors.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered March 1, 2011:

In re SMITH, Docket No. 299300. The Court, on its own motion, orders that the February 15, 2011, opinion is hereby amended. The opinion released as an unpublished opinion per curiam is amended to be an opinion per curiam for publication.

The Clerk's Office is directed to provide a copy of this order to the Reporter's Office along with a copy of the opinion per curiam.

In all other respects, the February 15, 2011, opinion remains unchanged, and the filing deadline for any additional relief shall run from that date. Reported at 291 Mich App 621.

Order Entered March 14, 2011:

KLINE v DEPARTMENT OF TRANSPORATION, Docket No. 295652; reported at 291 Mich App 651. The Court orders that a special panel shall not be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *McCahan v Brennan*, 291 Mich App 430; 804 NW2d 906 (2011).

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1. Questions concerning the applicability of the Uniform Enforcement of Foreign Judgments Act and the Full Faith and Credit Clause of the United States Constitution are reviewed de novo on appeal; decisions to dismiss a case on the basis of the doctrine of forum non conveniens or to dismiss a case that is properly within the jurisdiction of the court on the basis of pending or available litigation in an alternative, foreign forum are reviewed for an abuse of discretion (US Const, art IV, § 1; MCL 691.1171 *et seq*.). *Hare v Starr Commonwealth Corp*, 291 Mich App 206.

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1. An accused person has a constitutional right to confront the witnesses against him or her; when determining whether the right of confrontation would be infringed by permitting testimony by means of two-way, interactive video technology, a trial court must hear evidence and make case-specific findings that the use of such technology is necessary to further a public policy or state interest important enough to outweigh the defendant's right of confrontation and that it preserves all the other elements of the Confrontation Clause (US Const, Am VI; Const 1963, art 1, § 20). *People v Buie (After Remand)*, 291 Mich App 259.

2. A court may take trial testimony by way of two-way, interactive video technology when the defendant is present in the courtroom or has waived the right to be present if there is a showing of good cause and the parties consent; defense counsel may waive a defendant's right of confrontation, but only if the waiver is a legitimate trial tactic or strategy and the defendant does not object to the decision (MCR 6.006[C]). *People v Buie (After Remand)*, 291 Mich App 259.

CRIMINAL LAW

3. The de novo standard of review is properly employed in reviewing a defendant's challenge to the sufficiency of the evidence to support the defendant's conviction; reviewing an issue de novo requires the reviewing court

to address a legal issue anew, without deference to the trial court's conclusion on the issue. *People v Harverson*, 291 Mich App 171.

FULL FAITH AND CREDIT CLAUSE

4. The Full Faith and Credit Clause of the United States Constitution does not compel a forum state court to recognize and enforce sister-state antisuit injunctions (US Const, art IV, § 1). *Hare v Starr Commonwealth Corp*, 291 Mich App 206.

5. Under the Full Faith and Credit Clause of the United States Constitution, a foreign judgment is conclusive and must be recognized if jurisdiction has been obtained over the parties and the subject matter; however, the courts of this state are not obliged under the federal constitution to give a foreign judgment full faith and credit when the issuing court lacked jurisdiction over the subject matter or the parties, and a valid judgment affecting a nonresident's rights or interests may only be entered by a court having personal jurisdiction over that defendant (US Const, art IV, § 1). *Pecoraro v Rostagno-Wallat*, 291 Mich App 303.

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6. A sister-state judgment must constitute a final judgment on the merits in order to qualify for recognition under the Full Faith and Credit Clause of the United States Constitution (US Const, art IV, § 1). *Hare v Starr Commonwealth Corp*, 291 Mich App 206.

RIGHT TO PUBLIC TRIAL

7. A trial court may not close the courtroom to the public unless the party seeking closure advances an overriding interest that is likely to be prejudiced and the trial court considers all reasonable alternatives to closing the proceeding; however, the failure of the defendant to timely assert the right to a public trial forecloses the later grant of relief. *People v Vaughn*, 291 Mich App 183.

SELF-INCRIMINATION

8. The Fifth Amendment privilege against self-incrimination operates not only in criminal trials, but also protects an individual from official questioning in any other proceeding, civil or criminal, formal or informal, administrative or judicial, or investigatory or adjudicatory where the answers might incriminate the individual in future criminal proceedings; the privilege protects an individual from

being forced to answer any question that would furnish a link in the chain of evidence needed to prosecute; to sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result; a court should bar a claim of privilege only when the individual's answer cannot possibly be incriminating (US Const, Am V). *PCS4LESS, LLC v Stockton*, 291 Mich App 672.

9. The Fifth Amendment privilege against self-incrimination may apply when a governmental subpoena compels the holder of a document to perform an act that may have testimonial aspects and an incriminating effect; the act of producing a document may be subject to the privilege even though the contents of the document are not privileged (US Const, Am V). *PCS4LESS, LLC v Stockton*, 291 Mich App 672.
10. The Fifth Amendment privilege against self-incrimination may not be asserted on behalf of another and cannot be utilized by or on behalf of any organization, such as a corporation; organizations with independent existence apart from their individual members may not assert the privilege; the custodian of an organization's records may not refuse to produce the records even if those records might incriminate the custodian personally (US Const, Am V). *PCS4LESS, LLC v Stockton*, 291 Mich App 672.

SUPREMACY CLAUSE

11. Federal law preempts state law under the Supremacy Clause when Congress so intends; although federal law generally does not preempt state laws governing divorce or domestic relations, the Supremacy Clause will demand that state law be overridden when state family and family-property laws do major damage to clear and substantial federal interests (US Const, art VI, cl 2). *Biondo v Biondo*, 291 Mich App 720.
12. The Social Security Act prohibits the assignment of social security benefits and removes social security benefits from the reach of attachment, garnishment, or other legal process; the Supremacy Clause preempts state laws regarding the division of martial property only to the extent that such laws are inconsistent with the provision of the Social Security Act prohibiting the assignment, attachment, or garnishment of social se-

curity benefits (US Const, art VI, cl 2; 42 USC 407[a]). *Biondo v Biondo*, 291 Mich App 720.

CONSTRUCTION LIENS—*See*

LIENS 1

CONTINUING PATTERN OF CRIMINAL BEHAVIOR—*See*

SENTENCES 2, 3

CONTRACTORS—*See*

LIENS 1

CONTRACTS

GUARANTY CONTRACTS

1. A guaranty of payment is absolute while a guaranty of collection is conditional and becomes fixed only if the creditor exercises reasonable diligence in collecting from the principal debtor; when the unambiguous terms of a guaranty unconditionally guarantee payment, the creditor has no obligation to the guarantor to attempt to enforce the loan terms against the borrower. *Comerica Bank v Cohen*, 291 Mich App 40.
2. In a case in which the guarantor is entitled to notice, a failure to give notice of the principal's default does not discharge the guarantor unless the guarantor has actual loss or damages, and then only the amount of loss or damage is discharged. *Comerica Bank v Cohen*, 291 Mich App 40.

CONTROLLED SUBSTANCES

See, also, FORFEITURES AND PENALTIES 1

MEDICAL MARIJUANA

1. A person facing possible prosecution for violating Michigan's controlled substances laws may assert an affirmative defense under MCL 333.26428(a) if a physician has stated that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; but the physician's statement

must have been made before the person's arrest. *People v Kolanek*, 291 Mich App 227.

2. The affirmative defense provided under the Michigan Medical Marihuana Act for a person whose physician has stated that medical use of marijuana would provide therapeutic or palliative benefits for the person is effective only if the patient actively sought physician approval on or after December 4, 2008 (MCL 333.26428[a]). *People v Kolanek*, 291 Mich App 227.
3. Marijuana plants cultivated for medical purposes must be kept in an enclosed, locked facility, which is defined under the Michigan Medical Marihuana Act as a closet, room, or other enclosed area equipped with locks or other security devices; under the statute, a proper enclosure must be similar to a closet or room, that is, it must be stationary and closed on all sides, and the facility must have locks limiting access to the person authorized under the act to grow the marijuana or the qualifying patient (MCL 333.26423[c], 333.26424[a]). *People v King*, 291 Mich App 503.

CORPORATIONS

See, also, CONSTITUTIONAL LAW 10

HEALTH-CARE CORPORATIONS

1. The restrictions on permissible activities by a health-care corporation in MCL 550.1207(1)(o) do not expressly prohibit any particular activity undertaken by a health-care corporation's subsidiary that is not a health-care corporation. *Attorney General v Blue Cross Blue Shield of Michigan*, 291 Mich App 64.

COSTS OF PROSECUTION—*See*

CRIMINAL LAW 4

COURT OF CLAIMS—*See*

ACTIONS 1, 2

COURTS

ADMINISTRATIVE LAW

1. The doctrine of primary jurisdiction is applicable where the issues presented are of a type that an administrative agency possesses superior knowledge and expertise over the courts and that involve a regulatory area unfamiliar to the courts; referral to an agency is appropriate for

preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to thereafter be decided by the courts; it is the courts, not administrative agencies, that have ultimate authority over statutory interpretation and any statutory interpretation rendered by an administrative agency is not binding on the courts. *Attorney General v Blue Cross Blue Shield of Michigan*, 291 Mich App 64.

CREDIBILITY OF WITNESSES—*See*

TAXATION 5

CREDITORS—*See*

SECURED TRANSACTIONS 1

CRIME AGAINST A PERSON OR PROPERTY—*See*

SENTENCES 3

CRIMINAL DEFENSES—*See*

CONTROLLED SUBSTANCES 1, 2

CRIMINAL LAW

See, also, ASSAULT AND BATTERY 1
CONSTITUTIONAL LAW 3
CONTROLLED SUBSTANCES 3
ROBBERY 1

ATTORNEY AND CLIENT

1. A defendant need only be made aware of the direct consequences of a guilty plea in order for the defendant's counsel to provide effective assistance; a defendant's ignorance of the collateral consequences of a plea does not render the plea involuntary, and counsel's failure to properly advise regarding the collateral consequences of a plea does not bear on whether the defendant properly understood the decision to enter the plea. *People v Fonville*, 291 Mich App 363.
2. To provide effective assistance of counsel, defense counsel must advise a defendant contemplating a plea of guilty with regard to an offense listed in the Sex Offenders Registration Act that as a consequence of the guilty plea, the defendant will be required to register under the act; a failure to provide that information

affects whether the plea was knowingly made (MCL 28.721 *et seq*.). *People v Fonville*, 291 Mich App 363.

CHILD ENTICEMENT

3. The offense of child enticement involves the leading, taking, carrying away, decoying, or enticing away of a child under 14 yeas of age with the intent to detain or conceal the child from the child's parent; although the offense includes no express sexual component as a requirement for a conviction of the offense, the Legislature has deemed registration under the Sex Offenders Registration Act for those convicted of that offense a necessary measure to protect the safety and welfare of children in the state; requiring persons convicted of offenses listed in the Sex Offenders Registration Act to register is not punishment or a punitive measure intended to chastise, deter, or discipline an offender, but it is merely a remedial regulatory scheme furthering a legitimate state interest and does not constitute cruel or unusual punishment, (MCL 28.721a, 28.722[e][*vii*], 28.723, 750.350). *People v Fonville*, 291 Mich App 363.

COSTS OF PROSECUTION

4. A trial court must have statutory authority to order a criminal defendant to pay costs associated with his or her trial; when authorized, those costs must bear a reasonable relation to the expenses actually incurred in the prosecution, and the costs may not include expenditures made for the maintenance and functioning of governmental agencies that are to be borne by the public irrespective of specific violations of the law; the justification for the costs must be made part of the trial court record to allow an appellate court to determine whether the costs were allowable. *People v Dilworth*, 291 Mich App 399.

DOMESTIC VIOLENCE

5. MCL 768.27b allows trial courts to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the requirements of MRE 403; under MRE 403 the reviewing court must first decide if the evidence was unfairly prejudicial and then weigh the probativeness or relevance of the evidence against the unfair prejudice to determine whether any prejudicial effect substantially outweighed the probative value of the evidence. *People v Cameron*, 291 Mich App 599.

EFFECTIVE ASSISTANCE OF COUNSEL

6. A defendant asserting a claim of ineffective assistance of counsel must show that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that defense counsel's deficient performance so prejudiced the defendant that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different; in this process, the defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy. *People v Fonville*, 291 Mich App 363.

GUILTY PLEAS

7. When reviewing whether the factual basis for a defendant's guilty plea was adequate, the Court of Appeals considers whether the fact-finder could have found the defendant guilty on the basis of the facts elicited from the defendant at the plea proceeding; a factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant admitted, even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference; even if the defendant denies an element of the crime, the trial court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant admitted. *People v Fonville*, 291 Mich App 363.

8. A court should grant a motion to withdraw a guilty plea before sentencing only if the defendant shows that withdrawal of the plea is in the interest of justice, which requires the defendant to articulate a fair and just reason for withdrawing the plea; fair and just reasons include claims of actual innocence or a valid defense to the charge, not dissatisfaction with the sentence or incorrect advice from defense counsel (MCR 6.310[B]). *People v Fonville*, 291 Mich App 363.

MOTOR VEHICLES

9. The term "operating" in the statute prohibiting operation of a motor vehicle while under the influence of or visibly impaired by alcoholic liquor or a controlled substance must be defined in terms of the danger that the statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of or visibly impaired by alcoholic liquor or a controlled substance with other persons or property; once a person

using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk (MCL 256.625). *People v Lechleitner*, 291 Mich App 56.

10. The statute that provides that a person may be convicted when the person operates a motor vehicle while under the influence of or visibly impaired by alcoholic liquor or a controlled substance and by the operation of the vehicle causes the death of another person does not require that the defendant's vehicle be in motion at the time of the accident causing the death, but rather that the victim's death be caused by the defendant's operation of the vehicle while intoxicated (MCL 257.625[4]). *People v Lechleitner*, 291 Mich App 56.

POSSESSION OF BURGLARY TOOLS

11. MCL 750.116 prohibits the knowing possession of a tool, implement, or device adapted and designed for breaking open any building, room, vault, safe, or other depository to steal property held within; the term "depository" includes motor vehicles. *People v Osby*, 291 Mich App 412.

SEX OFFENDERS REGISTRATION ACT

12. Juveniles convicted of first-, second-, or third-degree criminal sexual conduct or charged with those crimes and convicted of certain lesser offenses may petition the court to remove their names from the sex offender registry in certain circumstances, but there is no provision allowing juveniles initially charged with fourth-degree criminal sexual conduct to petition for removal of their names from the registry (MCL 28.728c[15]). *In re MS*, 291 Mich App 439.

CRIMINAL SEXUAL CONDUCT—*See*

CRIMINAL LAW 12

CUSTODIANS OF DOCUMENTS—*See*

CONSTITUTIONAL LAW 10

CUSTODY OF CHILDREN—*See*

PARENT AND CHILD 1, 2

CUSTOMER CHOICE AND ELECTRICITY RELIABILITY ACT—*See*
PUBLIC UTILITIES 2

DEATH OF SPOUSAL-SUPPORT PAYORS—*See*
DIVORCE 4

DEFECTIVE NOTICE OF INTENT TO FILE SUIT—*See*
NEGLIGENCE 1

DEFENSES—*See*
CONTROLLED SUBSTANCES 1, 2

DELIBERATIVE-PROCESS PRIVILEGE FOR GOVERNMENTAL MATERIALS—*See*
PRETRIAL PROCEDURE 2

DEPOSITORIES BROKEN INTO WITH BURGLARY TOOLS—*See*
CRIMINAL LAW 11

DESIGN DEFECTS IN PUBLIC BUILDINGS—*See*
GOVERNMENTAL IMMUNITY 1

DESIGNATED DELIVERY SERVICES FOR FILING TAX TRIBUNAL PETITIONS—*See*
TAXATION 2

DIES, FORMS, AND TOOLS—*See*
LIENS 2

DIRECT CONSEQUENCES OF GUILTY PLEAS—*See*
CRIMINAL LAW 1

DISCHARGE AND DISMISSAL OF JUVENILE PROCEEDINGS—*See*
JUVENILE LAW 1

DISCHARGE OF GUARANTORS—*See*
CONTRACTS 2

DISCOVERY—*See*
PRETRIAL PROCEDURE 1, 2, 3, 4

DISMISSALS OF TAX TRIBUNAL ACTIONS—*See* TAXATION 3

DIVORCE

See, also, CONSTITUTIONAL LAW 11

CONCEALMENT OF ASSETS

1. In a divorce case, a circuit court may appoint a receiver over a third-party corporation in the face of allegations that one of the divorcing spouses used the corporate form to conceal assets or funds that could be used to satisfy a judgment debt to the other spouse. *Shouneyia v Shouneyia*, 291 Mich App 318.

JURISDICTION

2. "Resided," as used in MCL 552.9(1), is interpreted as "residence" and defined as "a place of abode accompanied with the intention to remain"; "intention to remain" does not mean a commitment to stay permanently or indefinitely, but only that a person reside in an area permanently enough to have legal relations and responsibilities. *Kar v Nanda*, 291 Mich App 284.

MARITAL PROPERTY

3. A trial court dividing marital property may consider the following factors: (1) the duration of the marriage, (2) contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life status of the parties, (6) the necessities and circumstances of the parties, (7) the earning abilities of the parties, (8) the past relations and conduct of the parties, and (9) general principles of equity; although the court may not treat social security benefits as tantamount to a marital asset, the court may take into account, in a general sense, the extent to which social security benefits received by the parties affect the factors the court considers in dividing marital property (42 USC 407[a]). *Biondo v Biondo*, 291 Mich App 720.

SPOUSAL SUPPORT

4. Spousal support may continue, undergo modification, or be implemented for the first time following the payor spouse's death; the burden of proving the need for modification rests on the party objecting to the previously determined support amount; a court may implement spousal support for the first time following the payor spouse's death if the divorce judgment reserved the question of support for further determination. *Luckow Estate v Luckow*, 291 Mich App 417.

DOCTRINE OF PRIMARY JURISDICTION—*See*
COURTS 1

DOMESTIC RELATIONS—*See*
CONSTITUTIONAL LAW 11

DOMESTIC VIOLENCE—*See*
ASSAULT AND BATTERY 1
CRIMINAL LAW 5

DOMINANT ESTATES—*See*
PROPERTY 1

DRAIN CODE—*See*
DRAINS 1

DRAINAGE—*See*
PROPERTY 1

DRAINS
See, also, PROPERTY 2
TRESPASS 1
DRAIN CODE
1. Chapter 4 of the Drain Code concerns the procedures applicable to proposed drains rather than established drains (MCL 280.71 *et seq.*). *Wiggins v City of Burton*, 291 Mich App 532.

DRUNK DRIVING—*See*
CRIMINAL LAW 9, 10
SENTENCES 1, 6

DUTY OF DEPARTMENT OF HUMAN SERVICES TO FACILITATE REUNIFICATION—*See*
TERMINATION OF PARENTAL RIGHTS 1

EASEMENTS—*See*
PROPERTY 2

EFFECTIVE ASSISTANCE OF COUNSEL—*See*
CRIMINAL LAW 1, 2, 6

ELEMENTS OF ASSAULT—*See*
ASSAULT AND BATTERY 1

ELEMENTS OF BATTERY—*See*
ASSAULT AND BATTERY 1

ELEMENTS OF CHILD ENTICEMENT—*See*
CRIMINAL LAW 3

ELEMENTS OF POSSESSING BURGLARY TOOLS—*See*
CRIMINAL LAW 11

ESTABLISHED DRAINS—*See*
DRAINS 1

ESTATES AND PROTECTED INDIVIDUALS CODE—*See*
SECURED TRANSACTIONS 1

ESTOPPEL OF INSURER—*See*
INSURANCE 2

EVIDENCE—*See*
CRIMINAL LAW 5
TAXATION 5

EXCULPATORY INFERENCES FROM GUILTY PLEAS—*See*
CRIMINAL LAW 7

FACTORS FOR CHANGING CHILD'S RESIDENCE—*See*
PARENT AND CHILD 2

FACTUAL BASIS OF GUILTY PLEAS—*See*
CRIMINAL LAW 7

FAILURE OF INSURER TO INVESTIGATE RISK—*See*
INSURANCE 2

FAILURES TO REPAIR OR MAINTAIN PUBLIC BUILDINGS—*See*
GOVERNMENTAL IMMUNITY 1

FAIR AND JUST REASONS TO WITHDRAW GUILTY PLEAS—*See*

CRIMINAL LAW 8

FAIR MARKET VALUE—*See*

TAXATION 6

FAMILY LAW—*See*

CONSTITUTIONAL LAW 11

FEDERAL PREEMPTION—*See*

CONSTITUTIONAL LAW 11, 12

FIFTH AMENDMENT—*See*

CONSTITUTIONAL LAW 8, 9, 10

FILING PERIOD FOR CONSTRUCTION LIENS—*See*

LIENS 1

FILING TAX TRIBUNAL PETITIONS—*See*

TAXATION 2

FINAL DISPOSITION OF CLAIMS FOR PURPOSES OF APPEAL—*See*

APPEAL 2

FINAL JUDGMENTS—*See*

CONSTITUTIONAL LAW 6

FINGERPRINT RECORDS—*See*

JUVENILE LAW 1

FOREIGN JUDGMENTS—*See*

CONSTITUTIONAL LAW 5

JUDGMENTS 1

FORFEITURES AND PENALTIES

CONTROLLED SUBSTANCES

1. Property that is used to aid in the violation of the state's controlled substance proscriptions may be subject to forfeiture under MCL 333.7521; MCL 333.7521(1)(f) provides an affirmative defense to the forfeiture if the

property owner lacked knowledge of or did not consent to the illegal act on which the forfeiture is premised; although the burden is on the claimant to affirmatively prove the facts supporting the defense, the claimant is not required to show that it did everything that reasonably could be expected of it to prevent the activity. *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243.

FORUM NON CONVENIENS—*See*

APPEAL 1

FRAUD—*See*

INSURANCE 3

FREEDOM OF INFORMATION ACT—*See*

LIMITATION OF ACTIONS 1

FULL FAITH AND CREDIT CLAUSE—*See*

APPEAL 1

CONSTITUTIONAL LAW 4, 5, 6

JUDGMENTS 1

GARNISHMENT OF SOCIAL SECURITY BENEFITS—*See*

CONSTITUTIONAL LAW 12

GOVERNMENTAL AGENCY DOCUMENTS—*See*

PRETRIAL PROCEDURE 2

GOVERNMENTAL IMMUNITY

PUBLIC-BUILDING EXCEPTION

1. Under the public-building exception to governmental immunity from tort liability, a design defect is a dangerous condition inherent in the design itself, such as its characteristics, functioning, and purpose; in contrast, a failure to repair or maintain is caused by extrinsic circumstances, such as a malfunction, deterioration, or instability of part of the building or the improper securing, construction, or installation of a fixture that is part of the building; reparative or preventative measures may supplement the existing structure to preserve the existing design, and an action that was originally a

design decision could be transformed into a failure to repair or maintain by subsequent improper installation, malfunction, deterioration, or instability (MCL 691.1406, 691.1407[1]). *Tellin v Forsyth Twp*, 291 Mich App 692.

2. A building is open to the public for purposes of the public-building exception to governmental immunity from tort liability if any part of it remains open to the public; in determining whether a building is open to the public, the focus is on the intended use of the building and not merely on the hours of operation (MCL 691.1406, 691.1407[1]). *Tellin v Forsyth Twp*, 291 Mich App 692.

GUARANTY CONTRACTS—*See*

CONTRACTS 1, 2

GUILTY PLEAS—*See*

CRIMINAL LAW 1, 2, 7, 8

HEALTH-CARE CORPORATIONS—*See*

CORPORATIONS 1

IMPAIRMENT OF A BODY FUNCTION—*See*

NEGLIGENCE 2

INCITEMENT TO RIOT—*See*

SENTENCES 7

INCREASING THE FLOW OR CONCENTRATION OF SURFACE WATERS ONTO A SERVIENT ESTATE—*See*

PROPERTY 1

INCULPATORY INFERENCES FROM GUILTY PLEAS—*See*

CRIMINAL LAW 7

INEFFECTIVE ASSISTANCE OF COUNSEL—*See*

CRIMINAL LAW 1, 2, 6

INFORMANTS—*See*

SEARCHES AND SEIZURES 1

INNOCENT OWNERS—*See*

FORFEITURES AND PENALTIES 1

INSTRUCTIONS TO JURY—*See*

TRIAL 1

INSURANCE

NO-FAULT

1. An insurer may not use fraud as a basis to void completely coverage under an insurance policy once an innocent third party has been injured, but an insurer may use fraud as a defense to void optional insurance coverage in excess of the statutory minimum amounts; an insurer may not deny coverage on the basis of fraud after it has collected premiums, however, when it easily could have ascertained the fraud at the time the contract was formed (MCL 257.520[f][1], [g]). *Titan Ins Co v Hyten*, 291 Mich App 445.
2. An insurer may cancel a no-fault policy if the risk is unacceptable to the insurer, but only within 55 days of the policy's issuance; if the insurer opts against undertaking an investigation of the risk it is insuring within that time, it may not use later-acquired information to terminate its policy obligations except under very limited circumstances (MCL 500.3220). *Titan Ins Co v Hyten*, 291 Mich App 445.
3. The work-loss benefits payable under the no-fault act are based on loss of income from work an injured person would have performed if he or she had not been injured; if a claimant has missed work, the only determination to be made is the amount of income lost as a consequence of not performing that work (MCL 500.3107[1][b]. *Copus v MEEMIC Insurance Co*, 291 Mich App 593.
4. An insured may be entitled to personal protection insurance benefits under the no-fault act for psychological injuries caused by witnessing the accident that killed the insured's child; the insured need not be involved in the accident itself or be injured by physical contact with a motor vehicle to be entitled to benefits (MCL 500.3105[1]). *Boertmann v Cincinnati Ins Co*, 291 Mich App 683.

UNINSURED-MOTORIST BENEFITS

5. An unambiguous provision in an uninsured-motorist policy must be enforced as written, regardless of the

equities and reasonableness of the provision; an insurer must establish actual prejudice to its position, however, in order to cut off its responsibility under an uninsured-motorist policy provision that requires the insured to report an accident involving a hit-and-run motor vehicle to the police within 24 hours and to the insurer within 30 days when the insured has failed to timely comply with the notice provision. *DeFrain v State Farm Mutual Ins Co*, 291 Mich App 713.

INTENTION TO REMAIN IN ABODE—*See*
DIVORCE 2

INVESTIGATIVE STOPS—*See*
SEARCHES AND SEIZURES 1

INVESTIGATIVE SUBPOENAS—*See*
PRETRIAL PROCEDURE 1

INVITEES—*See*
NEGLIGENCE 3

JOINDER OF THIRD-PARTY CORPORATIONS—*See*
DIVORCE 1

JOINT AND SEVERAL LIABILITY—*See*
TRESPASS 1

JOINT CUSTODY—*See*
PARENT AND CHILD 1

JOINT TORTFEASORS—*See*
TRESPASS 1

JUDGMENT DEBTORS AND CREDITORS—*See*
DIVORCE 1

JUDGMENT NOTWITHSTANDING THE VERDICT—*See*
TRIAL 2

JUDGMENTS
See, also, CONSTITUTIONAL LAW 5, 6

FOREIGN JUDGMENTS

1. A judgment entered in another state is presumptively valid and subject to recognition under the Full Faith and Credit Clause of the United States Constitution, although a collateral attack on such a judgment may be made in a Michigan court by showing that the judgment was void for want of jurisdiction over the subject matter or the parties in the court that issued it. *Hare v Starr Commonwealth Corp*, 291 Mich App 206.

ORDERS

2. The rule of comity is not allowed to operate when it will contravene the rights of a citizen of the state where the action is brought or contravene that state's policies or interests. *Hare v Starr Commonwealth Corp*, 291 Mich App 206.

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

3. A foreign judgment, to be enforceable under the Uniform Enforcement of Foreign Judgments Act, must have been entered by a court having jurisdiction over the parties and the subject matter (MCL 691.1171 *et seq*.). *Hare v Starr Commonwealth Corp*, 291 Mich App 206.

JUDGMENTS OF SISTER STATES—*See*

CONSTITUTIONAL LAW 6

JURISDICTION—*See*

CONSTITUTIONAL LAW 5

DIVORCE 2

JUDGMENTS 3

JURY INSTRUCTIONS—*See*

TRIAL 1

JUVENILE ADJUDICATIONS FOR PURPOSES OF SCORING OFFENSE VARIABLE 13—*See*

SENTENCES 2

JUVENILE LAW

DISCHARGE AND DISMISSAL OF JUVENILE PROCEEDINGS

1. Fingerprints and arrest cards shall be destroyed if (1) the case involves a juvenile who was adjudicated and found not to be within the provisions of MCL

712A.2(a)(1) (i.e., those found not to be within the jurisdiction of the family division of circuit court), or (2) the accused is found not guilty; the dismissal of a case does not constitute a finding of not guilty (MCL 28.243[8]). *In re Klocek*, 291 Mich App 9.

JUVENILES CONVICTED OF CRIMINAL SEXUAL CONDUCT—*See*

CRIMINAL LAW 12

LEGAL CUSTODY—*See*

PARENT AND CHILD 1

LEGITIMACY PRESUMPTION—*See*

PARENT AND CHILD 3, 4

LIENS

CONSTRUCTION LIENS

1. Under the Construction Lien Act, a construction lien must be filed with the register of deeds within 90 days after the lien claimant's last furnishing of labor or material for the improvement; an "improvement" is work that confers value beyond the value furnished at the time the initial installation work was completed; it does not include the performance of warranty work to correct deficiencies in work performed or defects in fixtures installed by the contractor; the distinguishing factor between a repair constituting an improvement to the real property and warranty work is whether the work in question conferred any value beyond the value furnished by the completion of the original work (MCL 570.1104[5], 570.1111[1]). *Stock Bldg Supply, LLC v Parsley Homes of Mazuchet Harbor, LLC*, 291 Mich App 403.

MOLDER'S LIENS

2. The molder's lien act requires a moldbuilder to permanently record on every die, mold, or form the moldbuilder's name, street address, city, and state; this requirement demands the presence of permanently affixed details on the mold, die, or tool itself for an enforceable lien to be created (MCL 445.619[1], [3]). *CG Automation & Fixture, Inc v Autoform, Inc*, 291 Mich App 333.

LIMITATION OF ACTIONS

See, also, NEGLIGENCE 1

FREEDOM OF INFORMATION ACT

1. The Freedom of Information Act requires that a public body respond to a request for public records either by granting it or by issuing a written notice to the requesting person denying the request; if a public body denies a request for information, the requesting person may commence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's determination to deny a request; the public body must undertake an affirmative step reasonably calculated to bring the denial notice to the attention of the requesting party; merely creating a document denying a record request is insufficient to start the running of the 180-day time limit (MCL 15.235[2][b], 15.240[1][b]). *Prins v Michigan State Police*, 291 Mich App 586.

LOCKED FACILITIES FOR STORING MEDICAL MARIJUANA—*See*

CONTROLLED SUBSTANCES 3

LOW-INCOME AND ENERGY EFFICIENCY FUND—*See*

PUBLIC UTILITIES 2

MARIJUANA—*See*

CONTROLLED SUBSTANCES 1, 2, 3

MARTIAL PROPERTY—*See*

CONSTITUTIONAL LAW 12

DIVORCE 3

MEDICAL MALPRACTICE—*See*

NEGLIGENCE 1

MEDICAL MARIJUANA—*See*

CONTROLLED SUBSTANCES 1, 2, 3

MICHIGAN MEDICAL MARIHUANA ACT—*See*

CONTROLLED SUBSTANCES 1, 2, 3

MICHIGAN VEHICLE CODE—*See*

PRETRIAL PROCEDURE 5

MISDEMEANOR PROSECUTIONS—*See*
PRETRIAL PROCEDURE 5, 6

MISREPRESENTATION BY APPLICANT—*See*
INSURANCE 2

MISREPRESENTATION BY INSURED—*See*
INSURANCE 1

MODIFICATIONS OF SPOUSAL SUPPORT—*See*
DIVORCE 4

MOLDBUILDERS' IDENTIFICATION—*See*
LIENS 2

MOLDER'S LIENS—*See*
LIENS 2

MORBIDITY AND MORTALITY INFORMATION—*See*
PRETRIAL PROCEDURE 3

MOTIONS AND ORDERS—*See*
TRIAL 2

MOTIONS TO WITHDRAW GUILTY PLEAS—*See*
CRIMINAL LAW 8

MOTOR VEHICLES—*See*
CRIMINAL LAW 9, 10, 11
INSURANCE 4
SEARCHES AND SEIZURES 1

NATURAL SERVITUDES—*See*
PROPERTY 1

NECESSITY OF TIMELY OBJECTION TO CLOSED TRIAL—*See*
CONSTITUTIONAL LAW 7

NEGLIGENCE
MEDICAL MALPRACTICE
1. *Griesbach v Ross (On Remand)*, 291 Mich App 295.

NO-FAULT

2. *Nelson v Dubose*, 291 Mich App 496.

PREMISES LIABILITY

3. A condition creates an open and obvious danger for which a premises possessor may be liable if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection; a condition that is not visible to a reasonable and sighted person is not an open and obvious danger. *Watts v Michigan Multi-King, Inc*, 291 Mich App 98.

NO-FAULT—*See*

INSURANCE 1, 2, 3, 4

NEGLIGENCE 2

NONPROFIT HEALTH CARE CORPORATION REFORM ACT—*See*

CORPORATIONS 1

NOT-GUILTY PLEAS—*See*

PRETRIAL PROCEDURE 6

NOTICE OF INTENT TO FILE A CLAIM AGAINST THE STATE—*See*

ACTIONS 1, 2

NOTICE OF INTENT TO FILE SUIT—*See*

NEGLIGENCE 1

NOTICE TO GUARANTOR OF DEFAULT—*See*

CONTRACTS 2

OBJECTIONS TO CLOSED TRIAL—*See*

CONSTITUTIONAL LAW 7

OFFENSE CLASSES—*See*

SENTENCES 3

OFFENSE VARIABLE 9—*See*

SENTENCES 4, 5

OFFENSE VARIABLE 13—*See*

SENTENCES 2, 3

OFFENSE VARIABLE 3—*See*

SENTENCES 8

OPEN AND OBVIOUS DANGERS—*See*

NEGLIGENCE 3

OPERATING A MOTOR VEHICLE—*See*

CRIMINAL LAW 9

OPERATION OF MOTOR VEHICLES WHILE INTOXICATED AND CAUSING DEATH—*See*

CRIMINAL LAW 9, 10

OPERATIONAL EXPENSES OF PUBLIC SERVICE COMMISSION—*See*

PUBLIC UTILITIES 3

OPTIONAL COVERAGE—*See*

INSURANCE 3

ORDERS—*See*

JUDGMENTS 2

PARENT AND CHILD

CHILD CUSTODY ACT

1. A court may grant joint physical custody of a child to both parties while granting sole legal custody to one party under proper circumstances (MCL 722.26a[7]). *Dailey v Kloenhamer*, 291 Mich App 660.

CUSTODY OF CHILDREN

2. A parent of a child whose custody is governed by court order may change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued if the court, after complying with MCL 722.31(4), which sets forth factors to be considered in a change of domicile, permits the change of residence; before allowing the change, the court must be satisfied that it is possible to order a modification of the parenting-time schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; the modified parenting-time schedule

need not be equal with the current visitation plan, and the correct inquiry under factor (c) is not which plan (the current plan or the proposed plan) is the best plan, but whether the proposed parenting-time schedule provides a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the nonrelocating parent. *McKimmy v Melling*, 291 Mich App 577.

LEGITIMACY PRESUMPTION

3. Under the Paternity Act, when a child is born to a married woman, her husband is presumed to be the legal father; a putative father of that child has standing to bring suit only if the court has determined that the child is not the issue of that marriage; such a determination must be an affirmative finding by the court regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father (MCL 722.711[a], MCL 722.714). *Pecoraro v Rostagno-Wallat*, 291 Mich App 303.
4. Whether a putative father would be considered a natural or biological parent under the Child Custody Act is irrelevant unless he can first establish paternity under Michigan's Paternity Act; without standing under the Paternity Act, the putative father must be considered a nonparent under the Child Custody Act, and his child custody claim is barred. *Pecoraro v Rostagno-Wallat*, 291 Mich App 303.

PARENTING TIME

5. A court may modify or amend its previous parenting-time order for proper cause shown or because of a change of circumstances; although normal life changes are insufficient grounds to change a minor child's custodial environment, if a change in parenting time is not so significant that it results in a change in the minor child's custodial environment, then normal life changes may constitute a change of circumstances sufficient to modify parenting time (MCL 722.27[1][c]). *Shade v Wright*, 291 Mich App 17.
6. A trial court may order a change in parenting time if it finds the change is in the child's best interests; both the statutory best-interest factors in the Child Custody Act and the factors listed in the parenting-time statute are relevant to parenting-time decisions, but the court must

make findings on only the contested factors (MCL 722.23, MCL 722.27a[6]). *Shade v Wright*, 291 Mich App 17.

PARENTAL RIGHTS—*See*

TERMINATION OF PARENTAL RIGHTS 1

PARENTING TIME—*See*

PARENT AND CHILD 2, 5, 6

PATERNITY ACT—*See*

PARENT AND CHILD 3, 4

PATTERN OF FELONIOUS CRIMINAL ACTIVITY—*See*

SENTENCES 2, 3

PAYMENT GUARANTIES—*See*

CONTRACTS 1

PEER-REVIEW PRIVILEGE—*See*

PRETRIAL PROCEDURE 3

PERIODS OF LIMITATIONS—*See*

LIMITATION OF ACTIONS 1

PERMANENTLY DEPRIVING THE OWNER OF PROPERTY—*See*

ROBBERY 1

PERMANENTLY RECORDED MOLDBUILDERS' IDENTIFICATION—*See*

LIENS 2

PERPETRATORS AS VICTIMS UNDER SENTENCING GUIDELINES—*See*

SENTENCES 8

PERSONAL JURISDICTION—*See*

CONSTITUTIONAL LAW 5

PERSONAL PROTECTION INSURANCE BENEFITS—*See*

INSURANCE 4

PETITIONS FOR REMOVAL FROM SEX OFFENDER REGISTRY—*See*

CRIMINAL LAW 12

PHYSICAL INJURY TO VICTIM—*See*

SENTENCES 8

PHYSICIAN-PATIENT PRIVILEGE—*See*

PRETRIAL PROCEDURE 4

PLEADING

AFFIRMATIVE DEFENSES

1. The term "pleading" as defined in the Michigan Court Rules includes only (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer; no other filings constitute pleadings; affirmative defenses, filed separately from an answer, are not pleadings (MCR 2.110[A]). *McCracken v City of Detroit*, 291 Mich App 522.

RESPONSES TO PLEADINGS

2. The only pleadings requiring a response are (1) a complaint, (2) a counterclaim, (3) a cross-claim, (4) a third-party complaint, or (5) an answer demanding a reply; affirmative defenses filed separately from an answer are not pleadings requiring a response even if they include a demand for a response. *McCracken v City of Detroit*, 291 Mich App 522.

PLEAS—*See*

PRETRIAL PROCEDURE 6

POSSESSION OF BURGLARY TOOLS—*See*

CRIMINAL LAW 11

PREEMPTION—*See*

CONSTITUTIONAL LAW 11, 12

PREJUDICE FROM FAILURE TO COMPLY WITH NOTICE REQUIREMENTS—*See*

ACTIONS 1, 2

PREJUDICE TO INSURER—*See*

INSURANCE 5

PREMISES LIABILITY—*See*

NEGLIGENCE 3

PRESUMPTION OF LEGITIMACY—*See*

PARENT AND CHILD 3, 4

PRESUMPTION OF VALIDITY OF FOREIGN JUDGMENTS—*See*

JUDGMENTS 1

PRETRIAL PROCEDURE

DISCOVERY

1. MCL 767A.8 makes confidential certain items related to an investigation, including (1) petitions for immunity, (2) orders granting immunity, (3) transcripts of testimony delivered to witnesses pursuant to grants of immunity, and (4) records, documents, and physical evidence obtained by the prosecuting attorney pursuant to an investigation under the investigative-subpoena statutes; under MCL 767A.5(6), transcripts of witness testimony are only available to a criminal defendant when the charges result from information obtained through investigative subpoenas and (a) the testimony is that of the defendant or (b) the testimony is that of witnesses who will testify at trial. *Truel v City of Dearborn*, 291 Mich App 125.
2. The deliberative-process privilege, which protects certain governmental material, is qualified rather than absolute and can be overcome by a sufficient showing of need, which must be determined on a case-by-case, ad hoc basis in which the court balances the evidentiary need against the harm that could result from disclosure, taking into account such factors as the relevance of the evidence, the availability of other evidence, the seriousness of the case, the role of the government, and the chilling effect on future governmental action. *Truel v City of Dearborn*, 291 Mich App 125.
3. Records, data, and knowledge collected by a peer review committee are confidential and may only be used for the purposes of a peer review committee to reduce morbidity

and mortality and to ensure quality of care (MCL 333.21515). *Johnson v Detroit Medical Center*, 291 Mich App 165.

4. Under the physician-patient privilege, a physician may not disclose any information acquired by the physician in attending a patient if the information was necessary for the treatment or the prescription of treatment of the patient; this privilege belongs to the patient, and only the patient may waive it (MCL 600.2157). *Johnson v Detroit Medical Center*, 291 Mich App 165.

MISDEMEANOR PROSECUTIONS

5. *City of Plymouth v McIntosh*, 291 Mich App 152.
6. Under MCL 764.9g, in order for the prosecution of a misdemeanor to continue after a defendant pleads not guilty, a sworn complaint must be filed; there is no requirement that the sworn complaint be filed after the plea is made, only that it is filed some time before additional proceedings take place after the plea. *City of Plymouth v McIntosh*, 291 Mich App 152.

PRIMARY JURISDICTION DOCTRINE—*See*

COURTS 1

PRIOR BAD ACTS—*See*

CRIMINAL LAW 5

PRIOR RECORD VARIABLE 5—*See*

SENTENCES 6

PRIOR TERMINATION OF PARENTAL RIGHTS TO CHILD'S SIBLING—*See*

TERMINATION OF PARENTAL RIGHTS 1

PRIORITY OF SECURITY INTERESTS—*See*

SECURED TRANSACTIONS 1

PRIVILEGE AGAINST SELF-INCRIMINATION—*See*

CONSTITUTIONAL LAW 8, 9, 10

PRIVILEGES—*See*

PRETRIAL PROCEDURE 2, 4

PRODUCTION OF DOCUMENTS—*See*

CONSTITUTIONAL LAW 9

PROPERTY

DRAINAGE

1. The natural flow of surface water from an upper, dominant estate forms a natural servitude that encumbers a lower, servient estate, but the owner of the upper estate may not increase the amount or concentrate the flow of water onto the servient estate; a person who increases the flow of water from an upper estate onto a lower estate may be held liable for trespass. *Wiggins v City of Burton*, 291 Mich App 532.

EASEMENTS

2. To determine the scope of an express easement, courts should first look to the language of the easement itself; when that language is clear it must be enforced as written; an express easement for storm detention is limited to the detention of waters that naturally flow to the easement as a result of storms; the installation of a drainage system to carry surface water to a storm-detention easement falls outside the scope of the express easement when the easement does not include language relating to the installation of pipes or drains. *Wiggins v City of Burton*, 291 Mich App 532.

PROPERTY DIVISIONS—*See*

CONSTITUTIONAL LAW 12

DIVORCE 3

PROPOSED DRAINS—*See*

DRAINS 1

PROSECUTION COSTS—*See*

CRIMINAL LAW 4

PSYCHOLOGICAL INJURIES—*See*

INSURANCE 4

PUBLIC-BUILDING EXCEPTION—*See*

GOVERNMENTAL IMMUNITY 1, 2

PUBLIC RECORDS—*See*

LIMITATION OF ACTIONS 1

PUBLIC SERVICE COMMISSION—*See*

PUBLIC UTILITIES 1, 2, 3

PUBLIC TRIALS—*See*

CONSTITUTIONAL LAW 7

PUBLIC UTILITIES

PUBLIC SERVICE COMMISSION

1. In the absence of specific statutory authorization, retroactive ratemaking in utility cases is prohibited, and past expenses and costs are not recoverable under a future rate; however, retroactive ratemaking involves a change either upward or downward in rates charged by a utility for its service under a lawful order and thus does not take place where a prospective rate takes into account a past expense, such as when the Public Service Commission permits a utility to use deferred-cost accounting. *In re Consumers Energy Application for Rate Increase*, 291 Mich App 106.
2. Under the Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq*., the Public Service Commission is authorized to administer the low-income and energy efficiency fund (LIEEF); MCL 460.10d(7) delineates a source for funding the LIEEF, but does not restrict funding of the LIEEF to excess securitization savings and permits the continuation of the LIEEF through the provision of ongoing appropriations beyond the initial six-year period. *In re Consumers Energy Application for Rate Increase*, 291 Mich App 106.
3. The Public Service Commission may accept funding for consultants from a regulated party only when statutorily authorized. *In re Consumers Energy Application for Rate Increase*, 291 Mich App 106.

PUTATIVE FATHERS—*See*

PARENT AND CHILD 3, 4

RATEMAKING AUTHORITY—*See*

PUBLIC UTILITIES 1, 2

REASONABLE SUSPICION JUSTIFYING AUTOMOBILE SEARCH—*See*

SEARCHES AND SEIZURES 1

REASONS TO WITHDRAW GUILTY PLEAS—*See*

CRIMINAL LAW 8

REBUTTAL OF PATERNITY PRESUMPTION—*See*
PARENT AND CHILD 3, 4

RECEIVERS—*See*
DIVORCE 1

REFORMATION OF POLICIES—*See*
INSURANCE 1

REGISTRATION AS SEX OFFENDER FOLLOWING GUILTY PLEA—*See*
CRIMINAL LAW 2

REGISTRATION AS SEX OFFENDER FOR CONVICTION OF CHILD ENTICEMENT—*See*
CRIMINAL LAW 3

REPEAT DRUNK-DRIVING OFFENDERS—*See*
SENTENCES 1

RESIDENCE OF CHILDREN—*See*
PARENT AND CHILD 2

RESIDENCY—*See*
DIVORCE 2

RESPONSES TO PLEADINGS—*See*
PLEADING 2

RETROACTIVE RATEMAKING—*See*
PUBLIC UTILITIES 1

REUNITING PARENT AND CHILD—*See*
TERMINATION OF PARENTAL RIGHTS 1

REVIEW DE NOVO OF SUFFICIENCY OF EVIDENCE—*See*
CONSTITUTIONAL LAW 3

REVIEW OF HEARING REFEREES' DECISIONS BY TAX TRIBUNAL—*See*
TAXATION 5

RIGHT OF CONFRONTATION—*See*

CONSTITUTIONAL LAW 1, 2

RIGHT TO PUBLIC TRIAL—*See*

CONSTITUTIONAL LAW 7

RIOTING—*See*

SENTENCES 7

ROBBERY

UNARMED ROBBERY

1. Unarmed robbery is a specific intent crime for which the prosecution must establish that the defendant intended to permanently deprive the owner of property; to permanently deprive in the context of unarmed robbery does not require, in a literal sense, that the defendant have an intent to permanently deprive the owner of property, rather, the intent to permanently deprive includes the retention of property without such retention being for the purpose of returning the property within a reasonable time or the retention of property with the intent to return the property only if the owner pays some compensation for its return (MCL 750.530). *People v Harverson*, 291 Mich App 171.

RULE OF COMITY—*See*

JUDGMENTS 2

SCOPE OF EASEMENTS—*See*

PROPERTY 2

SEARCHES AND SEIZURES

AUTOMOBILES

1. An unnamed informant's contemporaneous face-to-face tip to the police about erratic driving may be sufficient to justify an investigative stop of the driver's moving vehicle under the totality of the circumstances; the tip must identify the vehicle, support an inference of a traffic violation, and be corroborated in its innocent details by the police (US Const, Am IV; Const 1963, art 1, § 11). *People v Barbarich*, 291 Mich App 468.

SECURED TRANSACTIONS

CLAIMS AGAINST ESTATES

1. The Estates and Protected Individuals Code (EPIC)

precludes all proceedings to enforce a claim against an estate before the appointment of a personal representative except a proceeding brought by a secured creditor of the decedent to enforce the creditor's security; security interests are governed by article 9 of the Uniform Commercial Code, and no provision of EPIC requires a secured creditor that is otherwise entitled to exhaust a security to first bring a claim against the estate in order to be permitted to exhaust the security upon default, even though there will be insufficient funds in the estate to pay priority claims and allowances (MCL 440.9101 *et seq*.; MCL 700.3104, 700.3805, 700.3809). *In re Lundy Estate*, 291 Mich App 347.

SELF-INCRIMINATION—*See*

CONSTITUTIONAL LAW 8, 9, 10

SENTENCE ENHANCEMENTS—*See*

SENTENCES 1

SENTENCES

DRUNK DRIVING

1. A prior conviction of operating a motor vehicle while a minor and with any bodily alcohol content, MCL 257.625(6), may be used to increase the sentences. *People v Bulger*, 291 Mich App 1.

OFFENSE VARIABLE 13

2. Ten points must be scored under offense variable 13, regarding a continuing pattern of criminal behavior, if the defendant's offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property; an appropriate juvenile adjudication constitutes criminal activity, a criminal conviction is not required (MCL 777.43[1][d]). *People v Harverson*, 291 Mich App 171.
3. To determine whether a conspiracy conviction may be used when scoring offense variable 13 (continuing pattern of criminal behavior) under the sentencing guidelines, the sentencing court must consider the nature of the offense underlying the conspiracy; a conspiracy to commit a crime designated under the guidelines as a crime against a person or property may be used when scoring offense variable 13 (MCL 777.18, 777.21[4], 777.43[1]). *People v Jackson*, 291 Mich App 644.

OFFENSE VARIABLE 9

4. *People v Lechleitner*, 291 Mich App 56.
5. Scoring offense variable 9 for multiple victims may be appropriate, although the defendant may have robbed only one victim, when there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life during the robbery (MCL 777.39). *People v Harverson*, 291 Mich App 171.

PRIOR RECORD VARIABLE 5

6. The phrase "under the influence of or impaired by" alcohol in the statute regarding the scoring of prior record variable 5 refers to the drunk-driving statute, MCL 257.625, as a whole and not to specific crimes that include the same language as an element; a prior conviction under MCL 257.625(6) of operating a motor vehicle while a minor and with any bodily alcohol content may be used in scoring prior record variable 5 (MCL 777.55). *People v Bulger*, 291 Mich App 1.

RIOTING

7. A court, as part of the sentence for a conviction of any offense that the court determines was directly related to a riot, incitement to riot, unlawful assembly, or civil disorder on or within 2,500 feet of a public community college, college, or university campus in Michigan, may order the defendant not to enter any public community college, college, or university campus for one year following the imposition of the sentence or one year following the completion of any term of incarceration; if the defendant was also sentenced to a term of incarceration, the ban is in addition to the term of incarceration and does not begin to run until after the defendant completes the term of incarceration (MCL 769.1g[1][a][*ii*]). *City of East Lansing v Thompson*, 291 Mich App 34.

SENTENCING GUIDELINES

8. Offense variable 3, physical injury to a victim, may only be scored when a person is harmed by the criminal actions of the charged party, not by the actions of another person present when the crime is committed (MCL 777.33). *People v Laidler*, 291 Mich App 199.

SENTENCING GUIDELINES—*See*

SENTENCES 2, 3, 4, 6, 8

SERIOUS IMPAIRMENT OF A BODY FUNCTION—*See*

NEGLIGENCE 2

SERVIENT ESTATES—*See*
PROPERTY 1

SERVITUDES—*See*
PROPERTY 1

SEX OFFENDERS REGISTRATION ACT—*See*
CRIMINAL LAW 2, 3, 12

SISTER-STATE ANTISUIT INJUNCTIONS—*See*
CONSTITUTIONAL LAW 4

SISTER-STATE JUDGMENTS—*See*
CONSTITUTIONAL LAW 6

SIXTH AMENDMENT—*See*
CONSTITUTIONAL LAW 1, 2

SOCIAL SECURITY BENEFITS—*See*
CONSTITUTIONAL LAW 12—*See*
DIVORCE 3

SOLE LEGAL CUSTODY—*See*
PARENT AND CHILD 1

SOURCE OF FUNDING FOR LOW-INCOME AND ENERGY EFFICIENCY FUND—*See*
PUBLIC UTILITIES 2

SPOUSAL SUPPORT—*See*
DIVORCE 4

STANDARDS OF REVIEW—*See*
APPEAL 1
CONSTITUTIONAL LAW 3
TRIAL 1, 2

STANDING UNDER PATERNITY ACT—*See*
PARENT AND CHILD 3

STATUTORY AUTHORITY OF PUBLIC SERVICE COMMISSION TO ACCEPT FUNDING—*See*
PUBLIC UTILITIES 3

STOP AND FRISK—*See*

SEARCHES AND SEIZURES 1

STORM-DETENTION EASEMENTS—*See*

PROPERTY 2

SUBJECT-MATTER JURISDICTION—*See*

CONSTITUTIONAL LAW 5

JUDGMENTS 3

SUBPOENAS—*See*

CONSTITUTIONAL LAW 9

SUBSIDIARIES OF HEALTH-CARE CORPORATIONS—*See*

CORPORATIONS 1

SUBSTANTIAL COMPLIANCE WITH NOTICE REQUIREMENTS—*See*

ACTIONS 1, 2

SUFFICIENCY OF THE EVIDENCE—*See*

CONSTITUTIONAL LAW 3

SUPREMACY CLAUSE—*See*

CONSTITUTIONAL LAW 11, 12

SURFACE WATERS—*See*

PROPERTY 1, 2

SWORN COMPLAINTS FOR MISDEMEANORS—*See*

PRETRIAL PROCEDURE 5, 6

TAX TRIBUNAL—*See*

TAXATION 1, 2, 3, 4, 5, 6, 7

TAXATION

ADMINISTRATIVE LAW

1. Review of decisions of the Tax Tribunal by the Court of Appeals is, in the absence of fraud, limited to determining whether the tribunal made an error of law or adopted a wrong principle; the factual findings of the

tribunal are final provided that they are supported by competent and substantial evidence. *President Inn Properties, LLC v City of Grand Rapids*, 291 Mich App 625.

TAX TRIBUNAL

2. A petition filed in the Tax Tribunal is considered filed on or before the expiration of the period provided in MCL 205.735a for the filing of the petition if the petition is given to a delivery service designated by the Tax Tribunal for delivery on or before the expiration of the time period and the petition is delivered by the designated delivery service. *Grimm v Dep't of Treasury* , 291 Mich App 140.
3. The Tax Tribunal, before imposing the sanction of dismissal for failure to comply with its rules or orders, should consider (1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with previous orders of the Tax Tribunal, (3) the prejudice to the opposing party, (4) whether there exists a history of deliberate delay, (5) the degree of compliance with other parts of the Tax Tribunal's orders, (6) attempts to cure the defect, and (7) whether a lesser sanction would better serve the interests of justice. *Grimm v Dep't of Treasury* , 291 Mich App 140.
4. The Tax Tribunal must determine the most accurate valuation under the individual circumstances of the case; even when a petitioner fails to prove by the greater weight of the evidence that a challenged assessment is wrong, the tribunal may not automatically accept the valuation on the tax rolls and must make an independent valuation. *President Inn Properties, LLC v City of Grand Rapids*, 291 Mich App 625.
5. The Tax Tribunal, in considering a proposed decision of a hearing referee, may make its own determinations regarding the credibility of witnesses and the weight to be assigned to the evidence in the record. *President Inn Properties, LLC v City of Grand Rapids*, 291 Mich App 625.
6. The Tax Tribunal is not obligated to accept the valuation figures or approach to valuation advanced by the parties; any method for determining true cash value that is recognized as accurate and reasonably related to fair market valuation is an acceptable indicator of true cash value; regardless of the valuation approach em-

ployed, the final value determination must represent the usual price for which the property would sell; a valuation method is wrong only if it does not lead to the most accurate determination of the property's true cash value or fair market value. *President Inn Properties, LLC v City of Grand Rapids*, 291 Mich App 625.

7. A property's assessed valuation on the tax rolls carries no presumption of validity in Tax Tribunal proceedings regarding the valuation of the property; the Tax Tribunal may adopt the assessed valuation as its independent finding of true cash value when there is competent and substantial evidence supporting the valuation. *President Inn Properties, LLC v City of Grand Rapids*, 291 Mich App 625.

TERMINATION OF PARENTAL RIGHTS

DUTY OF DEPARTMENT OF HUMAN SERVICES TO FACILITATE REUNIFICATION

1. *In re Smith*, 291 Mich App 621.

TERRY STOPS—*See*

SEARCHES AND SEIZURES 1

TESTIMONY BY VIDEO TECHNOLOGY—*See*

CONSTITUTIONAL LAW 2

TORTS—*See*

GOVERNMENTAL IMMUNITY 1, 2

NEGLIGENCE 1, 2, 3

TRESPASS 1

TRESPASS

See, also, PROPERTY 1

JOINT TORTFEASORS

1. All persons who instigate, command, encourage, advise, ratify, or condone the commission of a trespass are cotrespassers and are jointly and severally liable as joint tortfeasors; a property owner who requests drainage relief from a city and authorizes the construction of a drainage system by the city, the installation of which constitutes a trespass on another's land, may be held liable for the trespass even though he or she did not personally set foot on the property. *Wiggins v City of Burton*, 291 Mich App 532.

TRIAL

See, also, CONSTITUTIONAL LAW 1, 2

JURY INSTRUCTIONS

1. A trial court's decision regarding what jury instructions should be given is reviewed on appeal for an abuse of discretion; a result that falls outside the range of principled outcomes is an abuse of discretion. *Nelson v Dubose*, 291 Mich App 496.

MOTIONS AND ORDERS

2. A trial court's decision to grant a motion for judgment notwithstanding the verdict is reviewed de novo on appeal; the jury's verdict must stand if reasonable jurors could have reached different conclusions; judgment notwithstanding the verdict is only appropriate if the evidence fails to establish a claim as a matter of law. *Nelson v Dubose*, 291 Mich App 496.

TRUE CASH VALUE—*See*

TAXATION 6, 7

TWO-WAY, INTERACTIVE VIDEO TECHNOLOGY—*See*

CONSTITUTIONAL LAW 1, 2

UNARMED ROBBERY—*See*

ROBBERY 1

UNDER THE INFLUENCE OF OR IMPAIRED BY ALCOHOL—*See*

SENTENCES 6

UNIFORM COMMERCIAL CODE—*See*

SECURED TRANSACTIONS 1

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT—*See*

APPEAL 1

JUDGMENTS 3

UNINSURED-MOTORIST BENEFITS—*See*

INSURANCE 5

UNIVERSITIES—*See*

SENTENCES 7

UNLAWFUL ASSEMBLY—*See*
SENTENCES 7

UNREGISTERED MEDICAL MARIJUANA USERS—*See*
CONTROLLED SUBSTANCES 1, 2

USE OF MOTOR VEHICLES AS MOTOR VEHICLES—*See*
INSURANCE 4

VALUATIONS OF PROPERTY—*See*
TAXATION 4, 6

VEHICLE CODE—*See*
PRETRIAL PROCEDURE 5

VICTIMS FOR PURPOSES OF SCORING OFFENSE VARIABLES—*See*
SENTENCES 5, 8

VIDEO TESTIMONY—*See*
CONSTITUTIONAL LAW 1, 2

VISITATION—*See*
PARENT AND CHILD 5, 6

WAIVER OF PHYSICIAN-PATIENT PRIVILEGE—*See*
PRETRIAL PROCEDURE 4

WARRANTY WORK—*See*
LIENS 1

WATERS AND WATERCOURSES—*See*
PROPERTY 1, 2

WEIGHT ASSIGNED TO EVIDENCE—*See*
TAXATION 5

WITNESSES—*See*
CONSTITUTIONAL LAW 1, 2
TAXATION 5

WORDS AND PHRASES—*See*
APPEAL 2
DIVORCE 2
CRIMINAL LAW 9
ROBBERY 1
SENTENCES 6
WORK-LOSS BENEFITS—*See*
INSURANCE 3